**82-2082**

No. _____

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IN THE

# Supreme Court of the United States

October Term, 1983

YVONNE LARSEN, W. DANIEL LARSEN,
JOSEPH K. HARMON, and EDWIN J. GRAY,

*Petitioners,*

*vs.*

JULIE FISHER,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT**

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## QUESTIONS PRESENTED

1. Whether the First Amendment to the United States Constitution compels entry of summary judgment in a civil defamation action brought by a defeated public official against her successful challenger for campaign statements criticizing her performance in office where the evidence is insufficient to support a finding of actual malice with the convincing clarity required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

2. Whether a candidate for public office can be found to have acted with actual malice for failing to further investigate criticisms of her opponent's conduct in office where the candidate relied on reports published in the news media and confirmed by a trustworthy source with first-hand knowledge of the events.

   a. Does a school board candidate have a duty to independently investigate information about the incumbent school board member's conduct in office which has been widely reported in local news media?

   b. Does a school board candidate have a duty to repeatedly reconfirm reports from the school superintendent about conversations he had with the incumbent school board member?

   c. Does a school board candidate have a duty to investigate the incumbent's denial of threatening the school superintendent where the superintendent has repeatedly confirmed that the threats were made?

## PARTIES

Petitioners are Yvonne Larsen, W. Daniel Larsen, Joseph K. Harmon, and Edwin J. Gray. Respondent is Julie Fisher.[1]

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[1]Michael Scott-Blair and Copely Press, Inc. were also parties to the proceedings in the court below. However, these parties were defendants on distinct and severable causes of action arising out of completely different facts and have no interest in the outcome of the actions brought by Julie Fisher against Petitioners.

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

## OPINION BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, is reported at 138 Cal.App.3d 627, 188 Cal.Rptr. 216 (1982) (Appendix A).[2]

## JURISDICTION

The decision of the Court of Appeal of the State of California, Fourth Appellate District, Division One, was filed on December 24, 1982, reversing in part the summary judgment entered in favor of Petitioners by the

[2]For convenience, the appendices to this Petition are separately presented.

Superior Court of California on May 13, 1981. The Court of Appeal denied a timely petition for rehearing on January 11, 1983 (Appendix B). On March 23, 1983, the Supreme Court of California denied a timely petition for hearing; Justice Mosk was of the opinion that the petition should be granted (Appendix C). This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech. . . .

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .

## STATEMENT OF THE CASE

### Statement of Facts

In June 1977, San Diego was stunned by the San Diego Teachers' Association's illegal strike. School Board member Julie Fisher played a highly visible and controversial role in the events surrounding the strike and in the School Board's decision to grant amnesty to the strikers despite their defiance of a temporary restraining order and a preliminary injunction.

Before the strike, the San Diego School Board authorized a negotiator to represent the School Board in negotiations with the San Diego Teachers' Association (Union). Fisher believed these fragile negotiations were failing. She decided to conduct her own negotiations with the Union without telling either the School Board or its authorized

negotiator. In deposition testimony Fisher stated that she was acting as a "self-appointed emissary."

On June 5, 1977 Fisher went to the Union office. She disclosed to Union leaders the tone and substance of confidential executive sessions of the School Board called in response to the threatened teachers' strike. Fisher and Union leaders developed a list of demands which Fisher would then urge School Superintendent Thomas Goodman to recommend to the School Board.

Fisher then took the list of Union demands to Superintendent Goodman's office to urge him to recommend the demands to the Board. Only two people were present at this meeting: Fisher and Goodman. Both versions of the meeting are set forth below.

**Fisher's version of the June 5 meeting.** Fisher told Superintendent Goodman that a teachers' strike should be avoided for the good of the District. She told him that if the District could solve integration and employee-relations problems, he would gain a national reputation. Fisher told Goodman that a teachers' strike would focus attention on him because "there were a lot of things that he was getting away with that nobody's paying attention to." She told him his wrongdoing included misuse of developers' funds. Goodman told her that if she believed him guilty, she should report him to the District Attorney or to the Grand Jury.

**Goodman's version of the June 5 meeting.** Fisher told Goodman a strike should be averted. She presented the Union demands and sought his support. She told him that if he did not support her proposal and if a strike occurred, she would publicly charge him with four counts of wrongdoing and call for his resignation. She accused him of: (1) misappropriating developers' funds; (2) falsifying attendance records; (3) improperly demoting an administrator; and (4) improperly recommending dismissal of a Children's Center supervisor. Goodman reminded Fisher that she had made the charges before and the School Board had rejected them. However, he advised her to inform the District Attorney or Grand Jury if she really believed the charges. Fisher replied that she had already gone to the Grand Jury, but they would not listen to her. Fisher said the Grand Jury would listen when she had the backing of 2,000 teachers. Superintendent Goodman prepared a chronology reflecting this conversation.

When Goodman refused to support Fisher's list of Union demands, Fisher returned to the Union office to continue her independent negotiations with the Union leaders. Fisher and Union leaders worked out an eight-point list of demands. Fisher then went to the homes of two School Board members and Superintendent Goodman, seeking their support for these Union demands.

When its demands were rejected, the Union called a strike. On Monday, June 6, 1977, the Honorable Wesley Buttermore, Judge of the Superior Court, issued a temporary restraining order declaring the strike illegal.

On Tuesday, June 7, 1977, the teachers remained on strike in defiance of the temporary restraining order. The School Board met. At that meeting Fisher charged Superintendent Goodman with the four charges of wrongdoing threatened at their June 5 meeting and called for his resignation. She left the School Board meeting and repeated the charges before the striking teachers who cheered: Julie! Julie! Julie!

Reverend George W. Smith, President of the School Board, promptly rebuked Fisher, condemning her "irresponsible and outrageous" attack on Superintendent Goodman. Reverend Smith held a press conference where he disclosed Fisher's conduct at the June 5 meeting with Superintendent Goodman. Reverend Smith revealed that Fisher had threatened to charge Goodman with wrongdoing and call for his resignation if Goodman did not support her proposal. According to reports in both major local daily newspapers, Fisher denied threatening Superintendent Goodman but Superintendent Goodman confirmed that Reverend Smith's account of Fisher's threats was accurate.

Tempers flared; criticism was caustic. School Board President Smith declared: "It is reprehensible that Mrs. Fisher is conducting her reelection campaign at the expense of Dr. Goodman and his family and that she feels that destruction of the integrity of the District is not too high a price to pay for her personal gain." Bill Foxx, General Manager of KCST-TV, broadcast an editorial demanding Fisher's immediate resignation.

On Wednesday, June 8, the Honorable Jack Levitt, Judge of the Superior Court, issued a preliminary injunction declaring the strike illegal. He agreed with the earlier ruling of Judge Buttermore that the

strike threatened irreparable harm to the District's students. Defying the injunction, the teachers remained on strike.

Fisher supported the teachers during the strike. She agreed with some of the striking teachers' demands including binding arbitration, reduced class size, and a 5% pay raise. On the third day of the illegal strike, Fisher went to the Union office, worked out and signed an amnesty agreement with the strikers, and attempted to get other School Board members to support the agreement. As Ray Kipp reported in the San Diego Union:

> The SDTA [San Diego Teachers' Association] aided by board member Julie Fisher, developed its own no-reprisal, back-to-work agreement late last night, and attempted to get at least two other board members to sign it.

The teachers continued to defy the injunction and remained on strike on Thursday, June 9. The School Board met again. When Fisher arrived at the Board meeting she was greeted by a standing ovation from the teachers in the audience. Fisher and two other Board members voted to grant the strikers amnesty; the strikers agreed to return to the classroom.

Many condemned the amnesty vote and Fisher's role in the teachers' strike. A letter to the editor of the San Diego Tribune described the amnesty vote as "the complete lack of backbone and the sellout of the taxpayers and the law-abiding students, parents, teachers, and other employees." City Councilman Mac Strobl called for Fisher's resignation. A La Jolla Light editorial by John Sasso sarcastically singled out Fisher for "[s]pecial commendation . . . for her open support of teachers in rebellion."

On July 27, 1977, Yvonne Larsen declared her candidacy for the School Board seat held by Fisher. W. Daniel Larsen and Joseph K. Harmon helped draft her campaign announcement criticizing Fisher's role in the illegal teachers' strike as follows: "Do taxpayers like it when Julie Fisher appears at union rallies and supports their demands?"

On October 24, 1977, Yvonne Larsen gave a campaign speech criticizing Fisher for threatening Superintendent Goodman. W. Daniel Larsen and Edwin J. Gray helped draft this speech which contained the following statements:

> We watched [Fisher] as she leveled a series of scurrilous charges against the superintendent of schools. This sorry chapter in the history of our schools was nothing less than blackmail.
>
> She told the superintendent that if he agreed to collaborate with the teachers union, she would see to it that he would gain such a good reputation that he could name his job anywhere in the country.
>
> But, if he refused, she would get him. She would accuse him of many things and publicly call for his resignation.
>
> The superintendent refused to go along with what was almost a form of bribery.
>
> Frankly, I hold no brief either for or against the superintendent. He was fully able to defend himself against the false and vicious charges he was threatened with.
>
> But outright blackmail is not a quality I take too lightly.
>
> The strike -- by any standard -- was illegal. In my opinion, it was also immoral. And my opponent was associated with it every step of the way.
>
> Her vote [or amnesty] coming as it did from one who earlier sought to blackmail the school superintendent, should not have been surprising."

On November 4, 1977, Yvonne Larsen held a news conference where she released a statement which W. Daniel Larsen and Edwin J. Gray helped draft. The statement criticized Fisher for her role in the teachers' strike as follows: "Furthermore, Julie Fisher's collaboration last Spring with the striking teachers -- who defied the law and a judge's order -- was, in my opinion, a direct violation of her oath of office to uphold the law."

On July 27, 1978, Fisher filed a complaint for libeland slander alleging she had been defamed by the Larsen campaign statements.

**How the Federal Question Was Raised**

Petitioners' First Amendment privilege under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) was raised at every stage of the proceedings. Appendix D consists of a summary of the following portions in the record where this federal question was raised below:

1. The complaint alleged that the statements complained of were made with actual malice;

2. Petitioners demurred to the complaint on First Amendment grounds;

3. Petitioners asserted as an affirmative defense that the action was barred by the First Amendment;

4. Petitioners moved for and obtained summary judgment on the ground that no question of fact exists on the issue of actual malice;

5. The Court of Appeal partially reversed the summary judgment on the ground that a question of fact exists on the issue of actual malice; and

6. Petitioners sought review by the California Supreme Court on the ground that the Court of Appeal decision on the issue of actual malice violated their First Amendment rights.

Thus, the controlling issue from the inception of this litigation has been the constitutional protection to be afforded to Petitioners' political speech.

**Finality of the State Court Decision**

The Court of Appeal reversed summary judgment in this public official defamation action on the ground that sufficient evidence of actual malice exists for the issue to go to the trier of fact. The California Supreme Court declined to exercise jurisdiction. Petitioners submit that the evidence is constitutionally insufficient to establish actual malice and that the burden of proceeding with litigation violates their constitutional rights. Petitioners are now faced with the expense and delay of a trial

and months -- if not years -- of repetitious appellate review of the very issues presented by this petition. Under these circumstances, this Court's jurisdictional requirement of finality is satisfied. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-487 (1975).

In *Cox Broadcasting* this Court defined categories of cases where a state court decision on a federal issue will be treated as a final judgment for the purposes of 28 U.S.C. § 1257 without awaiting the completion of the additional proceedings anticipated in the lower state courts. *Id.* at 477, 476-487. This case falls within the category of cases where a substantial federal issue has been finally and incorrectly decided by the state court and reversal of the state court decision would preclude further litigation on the causes of action. Although Petitioners may prevail at trial, if Petitioners are correct in asserting that the First Amendment requires summary judgment, there should be no trial at all. Moreover, if the Petitioners prevail at trial, the unreviewed decision of the Court of Appeal would survive to chill the exercise of free speech in political campaigns, thus eroding a fundamental constitutional right. *Id.*, at 482-486.

Petitioners therefore submit that the decision of the Court of Appeal is final for purposes of the jurisdiction of this Court under 28 U.S.C. § 1257(3).

## REASONS FOR GRANTING THE WRIT

### I

### THE DECISION BELOW PRESENTS SIGNIFICANT AND RECURRING CONSTITUTIONAL ISSUES CONCERNING THE APPLICATION OF *NEW YORK TIMES CO. V. SULLIVAN*

The decision below raises three recurring issues concerning the proper application of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The threshold issue is whether the *New York Times* actual malice standard applies to non-media defendants. The second issue concerns the procedure to be followed where the *New York Times* standard applies. Specifically, the issue is whether *New York Times* modifies the usual summary judgment rules and prescribes a policy of liberally granting summary judgments to prevent the chilling effect of protracted litigation. The third issue is whether actual malice can be established by showing a candidate for public office failed to contact the incumbent public official

before making statements critical of the incumbent's conduct in office based on information received from reliable sources.

### A. Does the *New York Times* actual malice standard apply to non-media defendants?

Petitioners are individual defendants in a defamation action brought by a defeated school board member for statements about her conduct in office made by her challenger in a school board election campaign. Throughout this litigation, Petitioners have relied on *New York Times v. Sullivan* to protect their First Amendment right to criticize a public official's conduct in office (Appendix D). The lower court extended the *New York Times* privilege to the Petitioners. However, this Court has never expressly applied the *New York Times* standard to non-media defendants. Certiorari should be granted so that this Court may consider and determine whether the *New York Times* privilege applies to non-media defendants.

This Court has frequently performed the delicate task of balancing the constitutional right to freedom of the press against the states' right to afford compensation for injury to reputation. In *New York Times*, after balancing these competing rights, this Court held that the First Amendment restricted the states' right to afford a remedy for harm to reputation by conferring a qualified immunity on the news media when it is sued by a public official. This Court prohibited the states from allowing a public official to recover for defamation from the news media unless the official proves actual malice.

While this Court has thus balanced state protection of individual reputation against constitutional protection of media speech, this Court has yet to weight state protection of individual reputation against constitutional protection of individual speech. In fact, in *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n. 16 (1979), this Court expressly reserved the question of whether the *New York Times* actual malice standard applies to non-media defendants.

Confronted with this open question, state and federal courts have been left to reach their own conclusion about the application of *New York Times* to non-media defendants. Courts facing this recurring issue have frequently held that the *New York Times* standard applies to non-media defendants. The courts reason that the purpose of the press is to

facilitate discussion by individuals. To protect the press but not the discussion would be to place greater value on the means than on the end. Distinguishing between individual and media defendants would create a "dangerous disequilibrium between the first amendment's guarantees of freedom of speech and the press." *Alvins v. White*, 627 F.2d 637, 649 (3d Cir. 1980).[3]

On the other hand, constitutional scholars have argued that a disequilibrium between the first amendment's guarantees of freedom of speech and the press is exactly what the Founding Fathers had in mind. As Justice Potter Stewart explained, the Free Press Clause must be distinguished from the Free Speech Clause:

> This basic understanding is essential, I think, to avoid an elementary error of constitutional law. It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy. . . By including both guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two.

Stewart, "Or of the Press," 26 Hastings L.J. 631 (1975).[4]

The question of the application of the *New York Times* actual malice standard to individuals is significant for two reasons. First, an individual's right to criticize a public official's conduct in office is guaranteed by the First Amendment. Extending the *New York Times* standard would protect this fundamental right. Second, delimiting the states' power to award damages for libel actions requires the accommodation of state and federal interests under the Constitution. Certiorari should be granted to resolve these issues.

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[3]Other cases considering this issue include: *Rowden v. Amick*, 446 S.W.2d 849 (Mo. 1969); *Jacron Sales Co., Inc. v. Sindorf*, 350 A.2d 688, 694-695 (Md. 1976); *Rowe v. Metz*, 564 P.2d 425 (Colo. 1977); *Bussie v. Larson*, 501 F.Supp. 1107, 1111-1113 (M.D. La. 1980); *Woy v. Turner*, 533 F.Supp. 102, 103-104 (N.D. Ga. 1981); and *Rodriquez v. Nishiki*, 653 P.2d 1145, 1149 (Haw. 1982).

[4]See generally, Symposium on the Press Clause, 7 Hofstra L.Rev. 559 (1979) considering whether the press is entitled to special constitutional privileges.

**B. Does the *New York Times* actual malice standard modify traditional summary judgment rules and prescribe a policy of liberally granting summary judgments?**

Petitioners obtained summary judgment on the ground that the evidence of actual malice was insufficient to present a triable issue of fact. The Court of Appeal partially reversed the summary judgment holding that the evidence of actual malice presented a triable issue of fact. Petitioners submit that the *New York Times* actual malice standard compels entry of summary judgment because the evidence is insufficient to establish actual malice with convincing clarity. Certiorari should be granted to determine the propriety of and the standard for summary judgment under *New York Times*.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) this Court held that the Constitution delimits a State's power to award damages for libel actions brought by public officials against critics of their official conduct. To recover, the public official must establish actual malice with clear and convincing evidence. *Id.*, 283-286.

Critics observed that the *New York Times* privilege operated too late in the litigation process to prevent self-censorship since the fear of defending a defamation action would be as chilling to the exercise of free speech as the fear of a judgment in the action. Anderson, *Libel and Press Self-Censorship*, 53 Tex.L.Rev. 422 (1975); *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) *cert. denied* 385 U.S. 1011 (1967). In practical terms, in 1975, the cost of a libel defense ranged from $10,000 to $19,000 (*Anderson, supra* at 434); currently, the fee for New York lawyers for the initial stages of a libel defense ranges from $20,000 to $35,000 (Kaus, *The Law: The Plaintiff's Hour*, Harper's 14 (March, 1983)). And the costs continue to climb.

To cure this serious deficiency in the *New York Times* privilege, state and federal courts adopted a policy of liberally granting summary judgment to insure early disposition of defamation actions having First Amendment implications. *Nader v. de Toledano*, 408 A.2d 31, 43 n. 7 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980) and cases cited therein. By 1979, many courts regarded the granting of summary judgment in libel actions as the rule rather than the exception. *Loeb v. New Times Communications Corp.*, 497 F.Supp. 85, 94 n. 14 (S.D.N.Y. 1980) and cases cited therein.

In 1979, this Court questioned but did not address the propriety of resolving the actual malice issue on summary judgment considering the complexity of the issue. *Hutchinson v. Proxmire*, 443 U.S. 111, 120, n. 9 (1979), *Wolston v. Reader's Digest Association*, 443 U.S. 157, 161 n. 3 (1979).

This Court's cautionary footnotes left the lower courts in a quandry. The Second Circuit announced that "until more directly advised" courts may no longer consider the chilling effect a libel suit may have on first amendment rights. *Yiamouyiannis v. Consumers Union of United States, Inc.*, 619 F.2d 932, 940 (2d Cir. 1979) *cert. denied* 449 U.S. 839 (1980). The Sixth Circuit has followed this lead. *Schultz v. Newsweek, Inc.*, 668 F.2d 911, 917 (6th Cir. 1982). Other courts however have continued to follow the rule of liberally granting summary judgment on the actual malice issue. *Edgartown Police Patrolmen's Association v. Johnson*, 522 F.Supp. 1149 (D.C. Mass. 1981). See 10A C. Wright & A. Miller, *Federal Practice and Procedure*, § 2730, pp. 240-248 (2d ed. 1983).

Beyond the question of the propriety of favoring summary judgment on the issue of actual malice, a question remains as to the standard the courts should use on summry judgment since actual malice must be established with clear and convincing evidence. *New York Times Co. v. Sullivan*, 376 U.S. 254 at 285-286 (1964); *Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d at 940; *Nader v. de Toledano*, 408 A.2d at 44-50. While summary judgment has frequently been granted on this issue, the trial courts have used different standards in reaching this result. These differing standards stem from differing interpretations of the *New York Times* admonition to the courts to independently examine the evidence to insure that First Amendment rights are protected. *New York Times Co.* at 285; *Nader* at 45; *Velle Transcendental Research Association v. Sanders*, 518 F.Supp. 512, 518-519 (C.D. Ca. 1981).

The differing standards for granting summary judgment fall within two main categories. First, some courts depart from the usual summary judgment rules. These courts require the trial judge to view the evidence in its most reasonable light and to grant summary judgment if the trial judge fails to find actual malice with convincing clarity. *Wasserman v. Time, Inc.*, 424 F.2d 920, 922-923 (D.C. Cir. 1969) *cert. denied* 398 U.S. 940 (1970). Second, some courts follow the usual summary judgment rules. These courts require the trial judge to view the evidence in the light

most favorable to the plaintiff and to deny summary judgment if a reasonable jury could find actual malice with convincing clarity. *Guam Federation of Teachers, Local 1581 v. Ysrael*, 492 F.2d 920, 922-923 (9th Cir. 1973) *cert. denied* 419 U.S. 872 (1974); *Loeb v. New Times Communications Corp.*, 497 F.Supp. 85, 94 (S.D.N.Y. 1980). See generally Note, *The Role of Summary Judgment in Political Libel Cases*, 52 S.Cal. L.Rev. 1783 (1979) and Note, *The Use of Summary Judgments in Defamation Cases*, 14 U.S.F.L. Rev. 77 (1979).

Thus, significant and recurring issues have arisen concerning the use of summary judgments in cases applying the *New York Times* actual malice standard. These issues involve the propriety of and the standard for granting summary judgment on the issue of actual malice. Certiorari should be granted to determine: (1) whether the First Amendment compels liberal use of the summary judgment procedure to prevent the chilling effect of protracted litigation; and (2) whether *New York Times* compels a departure from the traditional summary judgment standard of evaluating evidence of actual malice.

### C. Can a candidate for public office be found to have acted with actual malice for failing to contact her incumbent opponent before making campaign statements criticizing the incumbent's conduct in office?

Petitioners were sued for campaign statements criticizing Fisher for threatening Superintendent Goodman and supporting the striking teachers. Petitioners obtained summary judgment on the ground that these statements were not made with actual malice since Petitioners relied on widespread media reports confirmed by reliable sources. The Court of Appeal reversed holding that a jury could find actual malice because Fisher denied these reports and Petitioners failed to ask her about her denials. Certiorari should be granted to determine whether Petitioners' failure to investigate their opponent's denial of reliable information is sufficient to support a finding of actual malice with the convincing clarity required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The *New York Times* actual malice standard imposes a duty on appellate courts to independently examine the record to make certain that governing constitutional principles have been properly applied and that the plaintiff has met the burden of proving actual malice with convincing clarity. *Id.* at 286 and n. 26. Actual malice in public figure defamation

actions means knowledge of falsity or reckless disregard for truth or falsity. As explained by this Court in *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968):

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

Investigatory failures alone have repeatedly been held insufficient to establish actual malice with clear and convincing evidence as required by *New York Times*. *New York Times* at 288; *St. Amant* at 732-733. Indeed, the complete failure to investigate is not sufficient to show actual malice. *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967). Rather, to support a finding of recklessness, the record must contain clear and convincing evidence that the defendant subjectively entertained serious doubts about the truth of the information as where the defendant relied on an anonymous telephone tip or had other obvious reasons to doubt the veracity of the informant or the accuracy of the report. *St. Amant*, at 731.

The instant case presents the question of whether a public official's denial of accusations is sufficient to establish by clear and convincing evidence that Petitioners entertained serious doubts about the truth of information reported by reliable sources. The court below held that a jury could find that Petitioners acted recklessly because they failed to check with Fisher, the incumbent opponent, before making campaign statements based on widespread media reports which had been confirmed by trustworthy sources with first-hand knowledge of the events.

Before making the campaign statements at issue, Petitioners read the widespread media reports of Fisher's threats against Goodman and of her support for striking teachers. Petitioners independently verified these reports. They obtained Goodman's personal chronology documenting his account of Fisher's threats. Further, Yvonne Larsen contacted two other candidates for school board who had observed Fisher's conduct during the teachers' strike. Thus, Petitioners campaign statements were based on articles in reputable newspapers which Petitioners had independently verified by contacting reliable sources with first-hand knowledge of the events.

Despite this uncontradicted evidence, the court below held that the evidence supported a finding of actual malice. The court pointed to three items of evidence to support this conclusion: (1) the Petitioners' motive; (2) the Petitioners' reliance on Goodman's chronology; and (3) the Petitioners' failure to contact Fisher to learn her side of the story. These will be considered in order.

First, the court indicated that the Petitioners' motive supported a finding of actual malice. The court observed that Edwin J. Gray, the campaign manager, employed political rhetoric and hyperbole in an effort to make Larsen's campaign more "vigorous" and that W. Daniel Larsen wanted a "hard hiting" campaign. But, as this Court explained in *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), public official defamation actions must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." To base a finding of actual malice on the desire to engage in a vigorous political campaign destroys the protection that gives meaning to *New York Times*.

Second, the court held Petitioners' reliance on Goodman's chronology was reckless. The court suggested that Petitioners should have contacted Goodman to reconfirm his account. But they had already read two newspaper articles in which Goodman confirmed the threats and Goodman's personal written record of the threats. Petitioners had no reason to expect Goodman to disavow his account, and in fact he never has. Goodman testified in support of Petitioners' motion for summary judgment that his chronology was accurate. The court's suggestion that Petitioners should have confirmed this account for the fourth time imposes an excessively prudent and futile investigation requirement.

The court also held that Petitioners' reliance on Goodman was reckless because he was biased. But there was no unbiased source to turn to -- only Goodman and Fisher were at the meeting and their stories were irreconcilable. Petitioners submit that in actions involving the First Amendment, a defendant is entitled to rely on a single source, even if it represents only one side of the story, without fear of defamation prosecution by a public official. *Vanderburg v. Newsweek, Inc.*, 507 F.2d 1024, 1026-1028 (5th Cir. 1975); *New York Times v. Connor*, 365 F.2d 567, 576 (5th Cir. 1966).

The third and critical item of evidence relied on by the court to support a finding of actual malice is that Fisher denied the reports and that Petitioners failed to check with her before making campaign statements criticizing her performance in office. The court thus allows the plaintiff public official to establish actual malice simply by showing that she denied the accusations of wrongdoing.

This conclusion is a constitutional outrage! Few public officials candidly admit their own wrongdoing, most vehemently deny it. Yet, critics must be free to speak out if our democratic system is to survive. Fear of being subjected to protracted and expensive litigation chills the exercise of free speech. Recent reports indicate an increase in the use of libel actions to intimidate those who criticize public figures. Pell, "*Libel as a Political Weapon*," The Nation, June 6, 1981. The *New York Times* standard was designed to prevent the chilling effect of such actions. But permitting a finding of actual malice on a showing only that the public official denied wrongdoing destroys the protection promised by *New York Times*.

Certiorari should be granted so that this Court can determine whether the court below properly concluded that the *New York Times* actual malice standard can be satisfied by evidence that the plaintiff public official denied reliable reports criticizing her conduct in office. See *Martin Marietta Corp. v. Evening Star*, 417 F.Supp. 947, 960 (D.C.D.C. 1976).

## II

## THE DECISION BELOW PRESENTS CONSTITUTIONAL ISSUES CONCERNING THE APPLICATION OF *NEW YORK TIMES* WHICH ARE SIMILAR TO ISSUES ALREADY PENDING BEFORE THIS COURT

On April 25, 1983, this Court granted certiorari in *Bose Corp. v. Consumers Union of the United States, Inc.*, 692 F.2d 189 (1st Cir. 1982), *petition for cert. granted* 51 U.S.L.W. 3774 (1983) (No. 82-1246). In *Bose*, the First Circuit reversed judgment for the plaintiff manufacturer of loudspeakers in a product disparagement action brought against the publisher of a monthly magazine on the ground that the plaintiff failed to establish actual malice with the clear and convincing evidence required by the *New York Times* standard.

As in *Bose*, the instant case presents the issue of the standard for appellate review of evidence of actual malice under *New York Times*. But this case is factually distinguishable. This case concerns criticisms of a public official's conduct in office by individual defendants during a political campaign rather than criticisms of product performance by a media defendant in a monthly magazine. By considering *Bose* and the instant case together, this Court will be able to explore the constitutional policies and implications raised on the same substantive issue under different facts. Certiorari should be granted because of the significant similarities and the significant differences between the *Bose* case and the case at bar.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion of the California Court of Appeal, Fourth Appellate District.

Respectfully submitted,

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Office - Supreme Court, U.S.
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CLERK

**82-2082**

No. _____

IN THE

# Supreme Court of the United States

October Term, 1983

YVONNE LARSEN, W. DANIEL LARSEN,
JOSEPH K. HARMON, and EDWIN J. GRAY,

*Petitioners,*

*vs.*

JULIE FISHER,

*Respondent.*

## APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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## APPENDICES

A. Opinion of the California Court of Appeal

B. Denial of Petition for Rehearing by the California Court of Appeal

C. Denial of Petition for Hearing by the California Supreme Court

D. Summary of Portions of the Record Raising the Federal Question

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

COURT OF APPEAL
4TH DISTRICT DIV. I
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KEENAN B. CASADY, CLERK
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STATE OF CALIFORNIA

JULIE FISHER,

Plaintiff and Appellant,

v.

YVONNE LARSEN, W. DANIEL LARSEN, JOSEPH HARMON, EDWIN GRAY, MICHAEL SCOTT-BLAIR AND COPLEY PRESS INC.,

Defendants and Respondents.

4 Civ. No. 24990

(Super. Ct. No. 420137)

APPEAL from a judgment of the Superior Court of San Diego County, Stevens Fargo, Judge. (Assigned by the Chairperson of the Judicial Council.) Affirmed in part; reversed in part.

Julie Fisher, in pro. per., for Plaintiff and Appellant.

Hillyer & Irwin, Oscar F. Irwin, Margaret Z. Johns, Gray, Cary, Ames & Frye, David E. Monahan and Marilyn L. Huff for Defendants and Respondents.

Following an aggressive election campaign, highlighted by intense media coverage, Julia Fisher lost her seat on the San Diego Unified School District Board of Education. Fisher blames her defeat on defamatory statements made by members of her successful challenger's camp, and libels published in local newspapers.

In this defamation action, Fisher, acting as her own attorney, appeals summary judgments in favor of her successor, Yvonne Larsen, and

certain Larsen campaign workers; summary judgments in favor of reporter Michael Scott-Blair and Copley Press Inc. (Copley); and orders sustaining demurrers to certain causes of action. Because there remain triable issues of fact, we reverse one of the summary judgments for Copley and Scott-Blair, and each summary judgment favoring Yvonne Larsen and her campaign workers (except for designated parties). We affirm the order sustaining demurrers and reject other claims of error cited by Fisher. Finally, we hold the causes for Fisher's failure to prevail in the election are too uncertain to allow her to recover special damages reflecting the lost future and financial benefits of that position in a defamation action.

**Factual Background**

The contested 1977 election closely followed an illegal, widely-publicized, four-day teachers' strike by the San Diego Teachers' Association (Union) after which Fisher and other school board members granted amnesty to the strikers although the strike activities violated a court injunction. During the primary and general elections campaigns, Fisher and Larsen engaged in a series of bitter claims and counterclaims extensively reported by the two local Copley Press, Inc. newspapers, (the San Diego Union, and the Tribune) and other local media outlets.

Fisher's suit charges the Larsen campaign defendants,[1] San Diego Union reporter Scott-Blair, and Copley with conspiring to defame her during the campaign. She cites various publications: some describing her actions during the teachers' strike in a manner which, in other contexts would have been innocuous but, given her official status and the apparent media and community hostility toward the illegal strike, proved to be politically improvident, and other publications explicitly accusing her of attempting to bribe and blackmail a public official, the superintendent of schools.

**The Summary Judgments**

When overruling demurrers to causes of action based upon these allegations in Fisher's *first* amended complaint, the trial court determined the following separate public statements were reasonably subject to a

[1]Yvonne Larsen, W. Daniel Larsen, her husband, Joseph Harmon and Edwin Gray.

defamatory per se interpretation:

1. Yvonne Larsen's press-conference question: "Do taxpayers like it when Fisher appears at Union rallies and supports their demands?" (susceptible to an interpretation Fisher, an elected school board official, approved and aided an illegal strike by the Teachers' Association).

2. Contents of a San Diego Union article headlined "Support for Teacher's Union," containing the apparently factual assertion "She openly supported the teacheres during their four-day strike in June" (a claim suggesting Fisher was guilty of breaching her official trust).

3. A San Diego Union article flatly stating "Fisher *supported and marched with the striking teachers* last June." (The inaccuracy of the assertion Fisher marched with the strikers was admitted in a later San Diego Union editorial.)

4. Public charges by Yvonne Larsen accusing Fisher of:

(a) threatening to expose the school board superintendent to false charges of misconduct and illegal acts sufficient to cause him to lose his position unless he officially collaborated with the Teachers' Union, which Larsen characterized as "outright blackmail" and "nothing less than blackmail."

(b) being associated with the illegal teachers' strike "every step of the way;" and

(c) violating her official public trust by disclosing confidential, privileged information to the plaintiffs in a school integration case to which the school board was an adverse party.[2]

5. Press reports of the Larsen "blackmail" charge in news coverage of the meeting during which the accusations were made.

6. Miscellaneous public comments by Yvonne Larsen that Fisher "repeatedly said she would support striking teachers."

7. Yvonne Larsen's charges in a press release accusing Fisher of: (a) violating school district policies and state and federal laws by infringing upon the students' right to privacy; and (b) violating her oath of office by collaborating in the illegal teachers strike.

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[2]*Carlin v. Board of Education*, San Diego Superior Court No. 303800.

8. The San Diego Union's slanted reporting of Larsen's privacy invasion remarks in an article headed "Pupil Privacy Law Broken by Fisher, School Aide Says." (Unobtrusively buried in the article is the aide's acknowledgment both Fisher *and the school district had unintentionally* violated the privacy laws.)

9. A news article suggesting Fisher had stated she would support illegally striking teachers under similar circumstances in the future.

Each of these publications are discussed hereafter in the context of the causes of action to which it relates.

**Discussion**

The holding of *New York Times Co. v. Sullivan*, 376 U.S. 254, bars a public figure, from recovering for defamation unless actual malice is shown by clear and convincing evidence. This requires showing the disseminator of the falsehood either knew it to be untrue or made the publication with reckless disregard for truth.

The summary judgments may be upheld only if the evidence, construed favorably to Fisher, raises no triable issues of fact. It is not sufficient the moving declarations, standing alone, would support a defense judgment. The trial court may not weigh the credibility of declarants nor pass on the merits of the issues presented, and must construe movants' declarations strictly. (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.*, 4 Cal.3d 842, 851-852.)

Where allegedly libelous remarks can be understood by an average reader to be either a non-actionable expression of opinion or as a purported truthful statement of fact, the issue may not be resolved by summary judgment, but is one for the trier of fact. (*Slaughter v. Friedman*, 32 Cal.3d 149, 154.) However, where media publications are couched in ambiguous terms, a finding of actual malice may not be found unless the jury is convinced "not only that the words were reasonably understood in their defamatory, factual sense, but also that the defendant either deliberately cast his statements in an equivocal fashion in the hope of insinuating a defamatory impact to the reader, or that he knew or acted in reckless disregard of whether his words would be interpreted by the average reader as defamatory statements of fact." (*Good Government Group of Seal Beach, Inc. v. Superior Court*, 22 Cal.3d 672, 684.)

However, whether the publications are forthright or ambiguous, there must be some showing of potential actual malice to avoid summary judgment on that issue. (Id., at p. 685.)

Fisher, not a lawyer, claims the allegations of actual malice in her unverified complaint satisfies the required showing of actual malice. Fisher misconstrues her burden. While a demurrer tests the sufficiency of the pleadings and, in some instances, material allegations may be pleaded in the form of ultimate facts and in conclusionary language, summary judgment is designed to determine whether triable issues facially raised by the pleading are "real or merely the product of an inept pleading." (*Coyne v. Krempels*, 36 Cal.2d 257, 262.) Code of Civil Procedure section 437c requires a valid complaint be dismissed "unless the other party, *by affidavit or affidavits,* shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact." (*Coyne v. Krempels, supra*, at p. 262.) Allegations of a pleading may not be considered by a trial court to support or to oppose a summary judgment. (*Id.*, at pp. 262-263.) Apparently, because she relied substantially upon conclusionary allegations of actual malice in each cause of action of her unverified complaint, Fisher filed only a short non-factual declaration attached to her points and authorities and answers she made to Yvonne Larsen's interrogatories. Thus, our review is limited to the numerous depositions provided the trial court, Fisher's answers to interrogatories, and declarations in support of the summary judgment.[3]

## "PARTIAL" SUMMARY JUDGMENTS[4]

### Special Damages for Losses Flowing From Fisher's Election Defeat

In each cause of action, Fisher's only claim for special damages is based upon the loss of her elective office and its attendant earnings (salary, dental benefits, trips and other benefits). Civil Code section 48a,

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[3]Without relevant opposing declarations, or citations to the material portions of the forty depositions and other documents subsequently lodged, it is not surprising the trial court failed to locate the relatively few items supporting Fisher's position.

[4]Code of Civil Procedure, section 437c reads in part: "If it appears that the proof supports the granting of [a summary judgment] motion as to some but not all the issues involved in the action, . . . the court shall, by order, specify that such issues are without substantial controversy . . . and the action shall proceed as to the issues remaining."

subdivision 4(b), relating to news media, defines special damages as those suffered in respect to property, business, trade, profession or occupation and money spent as a result of the alleged libel and allows these to be recovered even where there is no demand for retraction.

The question of whether special damages limited to benefits and salaries, obtainable only by election to public office, are recoverable in a defamation[5] action appears to be one of first impression in this state although it has previously been considered in other jurisdictions.

In *Southwestern Publishing Co. v. Horsey* (9th Cir. 1956) 230 F.2d 319, the court considered whether a defeated judicial officer could recover lost future financial perquisites of office in a defamation action. The court found them too uncertain and speculative because a thousand factors might influence an election, including the extent of newspaper coverage, political leanings of people moving into and out of an area, political party support, group endorsements, volunteer workers' efforts, personal campaigning by the candidates, events in which the candidates participated that might affect their popularity, political trends, and issues debated. The court concluded looking into the causes of election defeats was akin to opening Pandora's box.

A similar holding in *Otero v. Ewing* (La.) 110 So. 648, 650, was delivered with the pithy comment: "It is common knowledge that there are many surprises at the result of elections by the people." (Accord, *Field v. Colson* (Ky.) 20 S.W. 264, 265; *Taylor v. Moseley* (Ky.) 186 S.W. 634, 637; *Lynch v. Republic Pub. Co.* (Wa.) 243 P.2d 636, 640; *Gough v. Tribune-Journal Company* (Ida.) 275 P.2d 663, 668.)

The evidence shows Fisher's reelection was vigorously and publicly opposed by the ten outspoken former school board presidents, by the current school board president and the publisher and editorial staff of the two newspapers having by far the greatest circulation in the district encompassed by this election. In addition, Fisher's opponent was hand picked by the county central committee of a major political party in an effort to have her defeated. Aside from these factors, even a consideration limited to Fisher's press coverage, preceding and during the

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[5]We do not consider the propriety of seeking such damages as an adjunct to other legal actions, although we are aware they have been disallowed for personal injury (*Chrysler Corp. v. Todorovich* (Wyo.) 580 P.2d 1123, 1124), and for conspiracy (*Ferguson v. Washburn* (Tex.) 4 S.W.2d 574, 576).

campaign, reveals the impossibility of assessing the significance to her defeat of these few beats in context of the year-long continuous drumroll of mostly negative publicity.

In this modern technological era with increasingly sophisticated polling techniques, we are reluctant to hold, as a matter of law, there may never be a case in which the evidentiary complexities cited in *Southwestern* may not be overcome. However, the evidence here does not show any possibility Fisher can establish she would have won reelection except for those statements we deemed potentially libelous.

Since we find no triable issue of fact in the issue of entitlement to special damages related to loss of salaries and benefits of Fisher's elected office, we affirm partial summary judgments on that issue in each cause of action in favor of all defendants.

## SUMMARY JUDGMENT: THE INDIVIDUAL CAUSES OF ACTION[6]

### I. Larsen Campaign Defendants

A. The charges of "blackmail" and other criminal conduct and breaches of trust sued on in the sixth cause of action were prepared by Edwin Gray, reviewed and adopted by W. Daniel Larsen and delivered by Yvonne Larsen during a public debate late in the campaign.[7] Gray described the speech as an effort to make Larsen's campaign more vigorous, and to this end he included charges of "blackmail" and innuendos of "bribery." The speech described Fisher's alleged misconduct and criminality in factual terms, although in his deposition Gray admitted previously knowing Fisher had denied the allegations when they were publicized months earlier in the press. He explains he simply chose to disbelieve so much of the news articles as reported Fisher's denials and explanations, and to accept the hearsay statements attributed to Board President Smith who purportedly gave a hearsay version allegedly obtained from the superintendent. Although Gray's declaration in support

[6]The summary judgments were granted on causes of action pleaded in Fisher's *second* amended complaint; therefore, different causes of action discussed in various portions of this opinion are identically numbered.

[7]Harmon is not shown to be involved in the acts of which Fisher complains in her sixth cause of action.

of his motion for summary judgment is somewhat more self-serving and emphatic, the trial court may not disregard the inference of reckless disregard for truth implicit in Gray's deposition in view of his stated motive to present a more vigorous (Dan Larsen said "hard biting") campaign.

These defendants downplay the significance of the blackmail and bribery charges, citing *Greenbelt Publishing Association v. Bresler*, 398 U.S. 6. This decision stresses the policy importance of insulating the news media from unwarranted attacks flowing from exercise of legitimate first amendment rights. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system." (*Stromberg v. California*, 283 U.S. 359, 369.)

Greenbelt was charged with including libelous statements of others in its accurate report of a public meeting in which Bresler was accused by several persons of obtaining unfair leverage over the city while negotiating zoning variances permitting him to construct high density housing on land he owned. He was charged with "blackmailing" the city by blocking its efforts to acquire certain other land Bresler owned. The facts reported did not even hint at illegality. The press article correctly attributed the "blackmail" charge to members of the public at that meeting. The Supreme Court held it was simply impossible to believe a reader of the word "blackmail" in the reports "would not have understood exactly what was meant: it was Bresler's public and wholly illegal negotiating proposals that were being criticized. *No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense.*" (*Greenbelt Publishing Association v. Bresler, supra*, 398 U.S. 6, 14.) The court found even the most careless reader would have relegated the term "blackmail" to mere rhetorical hyperbole, not an accusation of criminal activity.

However, *Greenbelt's* facts are far different than Larsen's purported statement of facts which, if true, describe criminal activities and label them as such. As is pointed out in the concurring opinion of Justice White, the Supreme Court "does not deny that the Constitution would permit recovery for charging the crime of blackmail . . . ." (*Id.*, at pp. 21-22.) Public statements purporting to be factual or which may be perceived by a jury to have been presented as factual, rather than

opinion, are actionable if they reasonably can be read in the context of the publication as charging a public official with a crime. (See *Good Government Group of Seal Beach, Inc. v. Superior Court, supra*, 22 Cal.3d 672, 683; *Gregory v. McDonnell Douglas Corp.*, 17 Cal.3d 596.) Larsen's use of the word "blackmail" in the context of her entire statement reasonably may be interpreted as charging a crime. Further, the reporting of these specific charges, although accurate, is subject to an interpretation by the average reader that the Larsens have accused Fisher of felonious acts.[8]

However, even where the words are reasonably understood in their defamatory factual sense, a defendant is entitled to summary judgment unless the trial court determines there is a sufficient showing of actual malice to warrant submission of that issue to the jury. (*Good Government Group of Seal Beach, Inc. v. Superior Court, supra*, 22 Cal.3d at p. 685.)

Here, the question of actual malice turns on whether the Larsens knew the statements were false or made them in reckless disregard of whether they were false. In their defense, the Larsens state the actions which they describe as attempted bribery and blackmail purportedly were made in a face-to-face confrontation between Fisher and Superintendent Goodman at a meeting with no one else present. Before making the public statements, the Larsens read two news articles in the San Diego Union, reporting statements made by School Board President Smith in which he accused Fisher of asking Goodman to support a list of suggestions she presented to him in an effort to avert the then-pending teachers' strike and support a Fisher espoused school desegregation plan. According to Smith, Fisher told Goodman she would call for his resignation if he did not follow her suggestions and, as a result, the teachers went on strike. The Larsens claim they acted reasonably in their belief in the truth of the statements, basing their belief on a chronological history kept by Superintendent Goodman and provided to them before preparing the speech. However, the Larsens knew of the past strained relations between Fisher and Goodman (they acknowledge awareness of Fisher's charges made earlier against Goodman which resulted in litigation and law enforcement investigation) and they reviewed the chronology

[8]The detailed alleged criminal conduct to support its labeling as "blackmail and bribery" transcends the mere use as such terms as a literary device for ridiculing political conduct. (See Bird, C.J., dis. *Good Government Group of Seal Beach, Inc. v. Superior Court, supra*, 22 Cal.3d at p. 689.)

knowing it was prepared by one of only two parties at the meeting in which the bribe was purportedly offered and the blackmail threats allegedly made.[9]

The Larsens made no effort to check the truthfulness of the chronology as prepared by Superintendent Goodman by contacting either Fisher or Goodman.[10]

Yvonne Larsen, in her declaration in support of summary judgment states: "While declarant is conscious of the bitter attacks upon the school superintendent by [Fisher], declarant had no reason whatsoever to question the veracity or integrity of the superintendent's report of the meeting with [Fisher], or the reports in the newspapers, . . . or the statements of the president of the Board of Education in regard to same."

We cannot tell from the court's order of summary judgment whether it believed there was no triable issue of fact in defendants' defense of truth (that the bribery and blackmail were actually attempted) or whether it simply determined there was no actual malice in the publication. If the former, then the order is erroneous because Fisher's deposition contains repeated and emphatic denials any such threats or promises were made during her face-to-face confrontation with Goodman.

Nor can the order be upheld on the ground there is no triable issue of fact as to whether the accusations of criminal conduct were made with actual malice. Because a trier of fact could resolve the credibility contest

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[9]Although labeled "blackmail," the language stated only can be reasonably interpreted as an attempt to "obtain . . . an official act of a public officer, induced by a wrongful use of fear" constituting felony of attempted extortion. (Pen. Code, §§ 518, 524.) (*Isaac v. Superior Court*, 79 Cal.App.3d 260.) The language is clearly susceptible to the plain meaning Fisher intended to expose some secret of the superintendent damaging to his reputation, in order to force him to subvert his official position to avoid exposure. (Pen. Code, § 519, subd. 4.)

[10]The document relied upon by the Larsens entitled "Chronology and Events Leading To and Occurring During June 6-9, 1977 Teachers' Strike Against San Diego City Schools" was apparently prepared by Goodman *after* the strike had terminated, after the Board of Education had granted blanket amnesty to the strikers and after Fisher made her charges against Goodman in the open board meeting. (It even contains some post-strike editorial comment by Goodman.) The 7-page "chronology" cannot be read as an unbiased report of events insofar as it refers to Fisher's activities. Yet, it is the only document upon which the Larsens claim to have relied.

over the dispute as to what actually transpired at the Goodman-Fisher confrontation in Fisher's favor, the question is whether the trier of fact could find Larsens' acceptance of Smith's hearsay version without investigation showed a reckless disregard of whether it was false. On this record, we cannot say a jury could not find actual malice. Although well able to do so, the Larsens took no steps to confirm the accuracy of the contents of Goodman's memo by contacting either Fisher or Goodman. And although mere negligence in investigating alone does not establish actual malice, evidence of the complete lack of investigation to determine the truth of the charges, of the Larsens' motive and intent in making the accusations, and their complete disregard of Fisher's denials may, by accumulation and by appropriate inferences, show recklessness.

"The mere profession of the defendant that he believed in good faith that his statements were true do not automatically entitle thim to a verdict in his favor." (*Widener v. Pacific Gas & Electric Co.*, 75 Cal.App.3d 415, 435, citing *St. Amant v. Thompson*, 390 U.S. 727, 732-733.) The court in *Goldwater v. Ginzburg*, 414 F.2d 324, 343, states: "[r]eckless is, after all, only negligence raised to a higher power." Further "actual malice" may be inferred when the investigation was grossly inadequate under the circumstances. (*Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024, 1026.)

There are no First Amendment protections for accusations of criminal conduct or personal dishonesty. (*Gregory v. McDonnell Douglas Corp., supra*, 17 Cal.3d 596, 604.) Where the information is from a source known to be hostile to the subject against whom the material is to be used, failure to investigate the truth of allegations solely received from this source may support a finding the publication has been made in wanton and reckless disregard of veracity. (*Curtis Publishing Co. v. Butts*, 388 U.S. 130, 156-157.) Where a public official is involved, whether failure to investigate criminal charges documented only by information from a source known to be biased against the person accused are made shows reckless disregard of their truth, is a matter to be decided by the trier of fact. Except as to Harmon, the summary judgment as to the sixth cause of action are reversed.

B. The first and second causes of action charge Yvonne Larsen, her campaign workers, W. Daniel Larsen (her husband), Joseph Harmon and Edwin Gray[11] with preparing and disseminating oral and written

[11]Gray is not shown to have been involved with the incidents described in these two causes of action which occurred approximately October 24, 1977.

defamation consisting of innuendos falsely accusing Fisher of appearing at Union rallies and supporting Union demands at a time when these remarks were likely to be perceived as charging her with collaborating in an illegal strike designed to unlawfully coerce the Board of Education of which Fisher herself was a member. If proved, this is defamatory per se.

Fisher's evidence shows she has always publicly stated she opposed all teachers' strikes, including the one in June 1977. Further, Harmon and W. Daniel Larsen each admits he was aware Fisher denied supporting the illegal strike *before* they prepared and presented the October 24th speech.

Harmon cannot recall upon what he relied in preparing the first press release about the speech. W. Daniel Larsen stated he held no opinion on whether Fisher favored the strikers going out on strike, only an impression she "was on the teachers' side." The complete lack of concern for the truthfulness of the innuendos of Fisher's collaboration with the illegal strikers is illustrated by this excerpt from W. Daniel Larsen's deposition:

> "Q. Was the truth or falsity of that statement that Mrs. Fisher had supported the teachers going out on strike ever discussed in campaign meetings?
>
> "A. No, I think it was just an assumed fact that nobody questioned.
>
> "Q. Did you become aware at some point in time that Mrs. Fisher was making statements to the effect that she had strongly opposed the teachers going out on strike?
>
> "A. Yes, but that didn't change our opinion.
>
> "Q. Did the committee do anything to attempt to determine whether or not Mrs. Fisher was, in fact, correct when she said she had opposed the teacher's strike?
>
> "A. No.
>
> "Q. Was there anyone on the committee who was assigned to do research into the truth or falsity of

statements that were made in the course of the Larsen campaign?

"A. No, I don't believe so.

".....

"Q. Well, was there ever any member of the committee who said, well, maybe we ought to check it out or talk to someone who was present at that time, or anything of that sort?

"A. Everybody was under the opinion that Mrs. Fisher supported the teachers and the actions that they took, including the strike."

Here, there are triable issues of fact on the issues of falsity and actual malice. Except as to Edwin Gray, we reverse the summary judgments on these causes of action.

C. The ninth cause of action faults Larsen and her compaign workers for accusing Fisher of (1) violating student privacy laws and (2) collaborating with (illegally) striking teachers in violation of her oath of office.

That Fisher (as well as the rest of the school administration) violated the privacy laws is undisputed. This statement is not false, and is well within the protected speech of a political campaign.

However, if false, the outright assertion Fisher had collaborated with teachers illegally striking against the board of education of which she was a member is defamatory per se. Although the characterization of her conduct as "unethical and unlawful" is couched in opinion form, the charge of "collaboration" is not. The statement is subject to a reasonable interpretation Fisher actively participated with and assisted the teachers in violating the law.

Although Larsen says she relied on media accounts, including the false report in Scott-Blair's article detailing Fisher's march with the striking teachers (see discussion, *post*), she ignores Fisher's published, repeated denials of support for teachers' strikes and the editorial apology for the Scott-Blair misstatements.

Because there is a triable issue of fact as to actual malice, we reverse the summary judgments on the ninth cause of action, except as to Harmon.

## II. Copley Press and Scott-Blair

A. The third cause of action accuses Copley Press and Scott-Blair, of defaming Fisher by reporting Yvonne Larsen's press conference, including her question, "Do the taxpayers like it when Julie Fisher appears at Union rallies and supports their demands?" Although the pleadings fault this report as unfair and false, the evidence shows it accurately reports an announcement of candidacy in one of the city's most newsworthy political races. It is clearly fair and neutral reportage of a news event allowing no inference the press was giving credence to the premise contained in Larsen's isolated question, nor undue emhasis upon that remark in context of the entire article. Absent an inference of malice, the trial court properly granted summary judgment on this cause of action.

B. The seventh cause of action complains of the news story (commencing on the *front* page of the San Diego Union's local section and continuing on page 4) reporting Larsen's October 24th speech and press release under the heading "School Candidate Larsen Accuses Fisher of Blackmail." Fisher does not claim the article is literally inaccurate. (It merely quotes Larsen's general charges of blackmail and perjury which are the subject of the fifth and sixth causes of action, without embellishment or editorial comment.[12]) However, she faults the press for unfairly distorting its coverage of the event at which the charges were made by displaying her political opponent's unproved charges of criminal conduct in the headlines, featuring the attack in the lead paragraphs and burying Fisher's rebuttal. One who reads only the headlines and lead paragraph would never know Fisher also appeared and spoke in the same forum. The San Diego Union admits this news coverage was unfair, as was its coverage of other stories highlighting accusations against Fisher, while omitting or minimizing defalcations of others. An editorial *mea culpa* published *after* the election describes its coverage of the last week of

[12]On the inside page, the article mentions Fisher had earlier denied the allegations underlying Larsen's charges, when Superintendent Goodman had publicly accused her of threatening to get him if he did not accede to the strikers' demands.

Fisher's campaign as a "blitz of negative stories," characterized by "bumbling non-actions and non-professional operations."

However, no matter how unfairly the article was presented and how cursorily it is read, it is not false. Even the headlines and lead paragraphs accurately attribute the public accusations to Larsen, a political candidate.[13] Therefore, even though elements of actual malice potentially lurk in this scenario, there is no triable issue on whether the publication is false. Summary judgment was proper.

C. The fourth and fifth causes of action challenge similar allegations made in separate news articles, reasonably subject to interpretation as factual reports of Fisher's endorsement of illegal teachers' strikes. However, because Fisher never formally demanded retraction of these articles, she only seeks to recover the "special" damages limited to loss of the future income and benefits of her lost elective office.[14] Since we hold these damages are not recoverable, summary judgments on the fourth and fifth causes of action were proper.

D. In her eighth cause of action, Fisher cites the San Diego Union November 3, 1977, article written by Scott-Blair which bluntly states she had "*repeatedly said she would support the striking teachers* and vote to grant them amnesty should circumstances similar to the June teaching strike arise again." (Italics added.) Although the article emphatically states Fisher made repeated statements to this effect, there is no evidence she did so.

The press disregarded a formal demand for retraction. Instead of relying on truth as a defense, the press contends the statement, within the scope of the entire article, and in the context of a political campaign, is not defamatory as a matter of law, citing *Desert Sun Publishing Co. v.*

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[13]For a historical overview of even more seamy political aspersions, see *Desert Sun Publishing Co. v. Superior Court*, 97 Cal.App.3d 49.

[14]Civil Code section 48a, subdivision 1 reads: "Special damages; notice and demand for correction. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at teh place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous."

*Superior Court, supra*, at pages 51 to 53. However, a newspaper article purporting to be accurate, objective reporting or political analysis, stands separately from partisan political publications produced by openly avowed advocates such as those discussed in *Desert Sun, supra*.

Contrary to these claims, the statement cannot be construed as only a statement of opinion regarding Fisher's future conduct; it purports to be a factual report of Fisher's *declared intent* to support illegally striking teachers in the future.

Scott-Blair states he was unaware of the falsity of this statement when he prepared the article. However, he continuously followed Fisher's campaign from before the June 1977 strike, and knew he earlier falsely reported Fisher had actually marched with the teachers during their illegal strike and knew Fisher publicly denied favoring teachers' strikes. (See San Diego Union editorial, 10/17/77, "Uplavici Syndrome Strikes Again . . ."). Because there are triable issues of fact here, we reverse the summary judgment on the eighth cause of action.

E. For the same reasons we uphold the summary judgment on the seventh cause of action, we approve the one awarded to the press on the tenth cause of action stemming from the November 4, 1977, news coverage of a press conference in which Larsen accused Fisher of breaking school privacy laws. The article augmented Larsen's comments with similar accusations from the school board's attorney. Although the unfairness of its mode of presentation was belatedly editorially admitted by the San Diego Union, its contents are factual.

### III. All Defendants

F. Fisher raises no triable issue of fact on the question of whether all or any of the defendants conspired to defame her. Summary judgment was proper on the eleventh cause of action.

## THE DEMURRERS WERE PROPERLY SUSTAINED[15]

Even though Fisher's notices of appeal do not specify she is appealing the rulings on demurrers, each party has fully briefed the propriety of the

[15]The demurrers were sustained to portions of Fisher's *first* amended complaint.

trial court's rulings sustaining demurrers to the sixth, ninth, tenth, fifteenth and seventeenth causes of action in the *first* amended complaint with leave to amend. In response, Fisher filed a second amended complaint in which the causes of action to which demurrers were overruled were restated by eliminating language which the court ordered stricken as surplusage. In spite of the opportunity to amend the sixth, ninth, tenth, fifteenth, and seventeenth causes of action, she did not do so, choosing instead to omit them entirely.[16]

On appeal, an order sustaining a demurrer will be upheld if the complaint or portion of the complaint fails to state a cause of action. (Code. Civ. Proc., § 430.10, subd. (3).)

The sixth cause of action alleges an article entitled *Julie Fisher Campaign Claims Denied By Others*, published in the San Diego Union reasonably can be understood in the context of the article as calling her a liar. However, campaign claims are often vigorously denied. As stated in *Scott v. McDonnell Douglas Corp.*, 37 Cal.App.3d 277, 291:

> "The fact that plaintiff takes umbrage at the tone and level of criticism directed against him is not sufficient to sustain an action for defamation. The statements in the instant controversy should be considered in the light of the usual political hyperbole customarily encountered when political figures clash on controversial public matters."

The article contains no actionable defamation.

The ninth cause of action alleged the Larsen campaign defendants defamed Fisher by criticizing her campaign advertising claim that windowless schools are costing taxpayers $100,000,000 extra.

Viewed against the background of a heated political election, the trial court properly concluded Larsen's comments unambiguously expressed only her opinion and as a matter of law were entitled to First Amendment protection.

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[16]We question whether Fisher's failure to include these specific causes of action in her superseding, second amended complaint precludes her from attacking the orders sustaining demurrers. (See *Witczak v. Johnson*, 146 Cal.App.2d 599, 601.) However, the defendants have not argued this point.

In her tenth cause of action Fisher attacks the San Diego Union article entitled *Board President Raps Fisher Election Ploy* and subheaded "Schools' High Cost Disputed." Larsen's reputed statements are clearly opinion and the court properly determined they were not actionable. (*Okun v. Superior Court*, 29 Cal.3d 442.)

The fifteenth cause of action concerned an article published just before election entitled *School Board Ex-Presidents Fault Fisher*. Fisher admits ten school board ex-presidents supported her opponent, but claims the story was overplayed. The newspaper, *after election*, editorially admitted it overemphasized the article and admitted failing to comply with general fair-reporting practices and its own reporting policy by not contacting Fisher for her response *before* publication. However, the article is factual, newsworthy in the context of the political campaign, and fully protected under the guarantees of the First Amendment. (See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258.)

The court also properly sustained the demurrer to Fisher's seventeenth cause of action charging the press defendants with negligent reporting. There is no cause of action for ordinary negligence by a public official against a newspaper. (*New York Times Co. v. Sullivan, supra*, 376 U.S. 254; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323.) The official must prove "actual malice" by showing either the statement was made (1) with actual knowledge it was false, or (2) with reckless disregard of whether it was false.

Fisher contends the correct rule is (or should be) that defamation flowing from ordinary negligence alone is actionable. She claims it is only the recovery of monetary damages which the foregoing cases will not allow on a showing of mere negligence. For this proposition, she posits a cause of action allowing a public official to sue for negligent defamation so long as the prayer is limited to a demand for a forced retraction. While there may be statutes authorizing such actions (see conc. opinion, Brennan, J., in *Miami Herald v. Tornillo, supra*, 418 U.S. 241, 258), Fisher has not pleaded under one, and she only asks for monetary relief. We are bound by the *New York Times v. Sullivan, supra*, standard. (*Good Government Group of Seal Beach, Inc. v. Superior Court, supra*, 22 Cal.3d 672, 680.)

## THE TRIAL COURT PROPERLY STRUCK IMMATERIAL ALLEGATIONS FROM THE ORIGINAL COMPLAINT

Fisher claims the trial court improperly struck portions of certain alleged publications from her pleadings. However, two of the cited publications were never included in any causes of action and thus were never stricken, and the trial court was within its discretion in deleting non-defamatory statements from others to exclude immaterial evidentiary matters from the complaint.[17]

Fisher relies on dicta from *Forsher v. Bugliosi*, 26 Cal.3d 792, for the premise the determination of whether a publication is defamatory depends on the publication taken as a whole, not extracted statements. We do not quarrel with her proposition, only her suggested application. Here, the causes of action affected by the motion to strike both withstood demurrer. Fisher was not precluded from pursuing her defamation action based on the total publications. Instead, the summary judgment motion as to thse publications proceeded on alternate theories the statements were true or not made with actual malice, not on whether a defamatory meaning was conveyed. Further, Fisher used the entire text of the publications as evidence in opposing the motion for summary judgment.

## THE COURT PROPERLY DENIED FISHER'S MOTION FOR AN *IN CAMERA* INSPECTION OF UNPUBLISHED NOTES

Copley Press initially refused a request to produce its employee's (Jacoby) unpublished notes, claiming privilege, but later produced them pursuant to court order.

Six months later Fisher again requested an order compelling production of Jacoby's documents. Copley Press submitted Jacoby's declaration stating:

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[17]Two of the publications pertained to the Larsen campaign defendants. Larsen's speech about Fisher's charges against Superintendent Goodman was incorporated in the seventh cause of action of the original and first amended complaints. The trial court struck portions of this speech from the complaint. Larsen's news release about Fisher violating the Pupil Privacy Law was incorporated in the thirteenth cause of action of the first amended complaint. The trial court struck portions of this news release.

> "I have produced all those notes in my possession or under my control. There are other matters in my notebook which have nothing to do with the Fisher matter and which this Court should not require me to produce."

The court denied Fisher's motion and her request for an *in camera* inspection of Mr. Jacoby's entire notebook.

Code of Civil Procedure section 2034 pertaining to a motion to compel the production of documents leaves the decision to make an *in camera* inspection of documents to the court's discretion. The record shows no abuse of discretion here. (*Dowell v. Superior Court*, 47 Cal.2d 483, 486.)

## THE COURT DID NOT ERR IN DENYING FISHER'S MOTION TO CONTINUE THE SUMMARY JUDGMENT HEARING

On February 20, 1980, Fisher formally discharged her attorney, substituted herself, and moved for a continuance to obtain new counsel and complete discovery. The trial court found the motion both untimely and without a showing of good cause.

Generally, power to determine when a continuance should be granted is within the discretion of the court, and there is no right to a continuance as a matter of law. (*Thurmond v. Superior Court*, 66 Cal.2d 836, 838-840.) However, Code of Civil Procedure section 437c mandates a continuance of a summary judgment hearing upon a good faith showing by affifavit [*sic*] that a continuance is needed to obtain facts essential to justify opposition to the motion. Fisher sought to justify a continuance because she desired additional discovery of the Copley Press personnel and Scott-Blair.[11]

It is not an abuse of discretion to deny a continuance to discover further evidence where the action has been pending a long time and extensive discovery has already been conducted. (*Vanderbilt Growth Fund, Inc. v. Superior Court*, 105 Cal.App.3d 628.) Here, Fisher pursued an

[11]She also wished to depose two superior court judges and to explore the possibility San Diego Federal Savings and Loan Association was involved in the "conspiracy" against her. However, she makes no showing this discovery was necessary to oppose the summary judgments.

ambitious discovery schedule for more than two years, took dozens of depositions and sent out numerous interrogatories. She had already deposed numerous Copley representatives including the publisher, editor, assistant editor, city editor, the reader's representative, the reporter of the subject articles, an employee of Copley International, a reporter for the Tribune and Scott-Blair. Although appearing without counsel, she eloquently, and at length, argued her case. Further, the court received extensive evidence by way of the exhaustive discovery already taken.

While we believe Fisher's request for continuance was not untimely, we find no good cause for the request. Her attorney was discharged because Fisher believed his efforts in pursuing discovery[19] were insufficient. There is no showing he would not have represented her at the hearing except for the discharge. His past performance reveals he was capable, and had established a good rapport with the trial court. Further, Fisher failed to show she would procure other counsel in the reasonably near future.[20]

The court in a public-figure libel case has the power to control and limit discovery. (*Herbert v. Lando*, 441 U.S. 153, 177.) The trial court properly exercised its sound discretion in denying the continuance. Although Fisher had ample opportunity, she does not show how she was prejudiced by the denial of a continuance, either in her points and authorities filed after the hearing on the summary judgment motion, in her declarations in support of her motion for reconsideration of the summary judgment, or in her appellate presentations.

## THE COURT PROPERLY REFUSED TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW

Fisher is not entitled to findings of fact and conclusions of law on the summary judgments. (*Perry v. Farley Bros. Moring & Storage, Inc.*, 6 Cal.App.3d 884, 889.)

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[19]The record reveals the efforts of Fisher's attorney were prodigious.

[20]At oral argument, 19 months later, Fisher, who has effectively represented herself on this appeal, was still without counsel.

## THE MOTION TO AMEND AFTER SUMMARY JUDGMENT WAS PROPERLY DENIED

Fisher knew of the motions for summary judgment as early as January 6, 1981, but took no action to amend for five months. The rights to amend a complaint rest within the sound discretion of the court (*Robinson & Wilson, Inc. v. Stone*, 35 Cal.App.3d 396, 413), and may be denied where there has been a long delay in seeking the amendment. (*Rainer v. Community Memorial Hospital*, 18 Cal.App.3d 240, 258.) The court was within its discretion in denying the amendment.[21]

### Disposition

The orders sustaining demurrers are affirmed.

Summary judgments on the first and second causes of action are affirmed in favor of Edwin Gray, and reversed as to Yvonne Larsen, W. Daniel Larsen and Joseph Harmon.

Summary judgments on the sixth and ninth causes of action are affirmed in favor of Joseph Harmon, and reversed as to Yvonne Larsen, W. Daniel Larsen and Edwin Gray.

Summary judgments on the third, fourth, fifth, seventh, tenth and eleventh causes of action are affirmed.

Summary judgment on the eighth cause of action is reversed.

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[21]Fisher also purports to appeal from a denial of her motion to reconsider the court's orders denying her continuance of the summary judgment hearings and granting the summary judgments. (Code Civ. Proc., § 1008.) However, the court actually granted her request to reconsider, read the supporting documents (which included no new facts) and with exceptional patience and courtesy listened to rambling oral argument. Only then did the court affirm its previous rulings.

On remand the superior court shall strike the prayer for special damages from all remaining causes of action.

CERTIFIED FOR PUBLICATION.

Work
WORK, J.

WE CONCUR:

Wiener
WIENER, Acting P.J.

Zumwalt
ZUMWALT, J.*

*Assigned by the Chairperson of the Judicial Council.

# COURT OF APPEAL—STATE OF CALIFORNIA

## FOURTH APPELLATE DISTRICT

DIVISION ONE

JULIE FISHER,
Plaintiff-Appellant,

vs.

YVONNE LARSEN, ET AL.,
Defendants-Respondents.

4 Civil No. 24990

SUPERIOR COURT NO. 420137

THE COURT:

The petitions for rehearing are denied.

Acting Presiding Justice

Copies to: Ms. Julie Fisher
Mr. Oscar Irwin
Ms. Marilyn Huff
Superior Court, SD

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

*I have this day filed Order* MAR 23 1983

HEARING DENIED

Mosk, J. OF THE OPINION THAT THE ~~PETITION SHOULD BE GRANTED.~~

*In re:* 4 Civ. *No.* 24990

Fisher

*vs.*

Larsen et al.

*Respectfully,*

*Clerk*

27074-877 9-82 4M * OSP

## SUMMARY OF PORTIONS OF THE RECORD RAISING PETITIONERS' *NEW YORK TIMES* PRIVILEGE

1. **Complaint.** The complaint, first amended complaint and second amended complaint allege that the statements complained of were made with actual malice in that Petitioners knew they were false or acted in reckless disregard of the truth of the statements.

2. **Demurrers.** Petitioners demurred to Fisher's original and first amended complaints on the grounds that the statements complained of were protected by the *New York Times* privilege. The trial court granted and the appellate court affirmed demurrers to certain causes of action against Petitioners. However, the demurrers to the causes of action at issue herein were denied.

3. **Answer.** In answer to Fisher's second amended complaint, Petitioners denied the allegation that the statements complained of were made with actual malice and alleged as an affirmative defense:

> Plaintiff's claim for relief in the First, Second, Sixth, Ninth and Eleventh Causes of Action of plaintiff's Complaint is barred by reason of the defendant's right of free speech as guaranteed to the defendant by the United States Constitution, amend. I, § 2, and by the provisions of amend. XIV, § 1, cl. 2 applying the privileges of free speech under the United States Constitution to defendant under state law.

4. **Motion for Summary Judgment.** Petitioners moved for and obtained summary judgment on the actions at issue herein on the grounds that the *New York Times* actual malice requirement applied to the action, that investigatory failures were insufficient to satisfy the requirement, and that summary judgment was a favored remedy in defamation actions having first amendment implications. In support of their motion, Petitioners submitted declarations under penalty of perjury by Yvonne Larsen, W. Daniel Larsen, Joseph K. Harmon, Edwin J. Gray, and Thomas Goodman. As documentary evidence, Petitioners submitted Thomas Goodman's chronology reflecting his June 5, 1977, meeting with Fisher and the media reports and editorials Petitioners relied on in making their campaign statements about Fisher's conduct in office.

Specifically, with respect to the statements about Fisher's threatening Superintendent Goodman, Petitioners testified that they relied on media reports and Superintendent Goodman's chronology. Goodman testified that his chronology accurately reflected the meeting with Fisher. Petitioners demonstrated that Fisher's actual conduct was consistent with Goodman's version of the meeting. Petitioners argued that the statements were true, that they were not made with actual malice, and that they were protected under *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970).

With respect to the statements about Fisher's role in the teachers' strike, Petitioners testified that they relied on media reports and editorials about Fisher's conduct during the strike. Petitioners documented the fourteen media publications they read prior to making the statements. These publications lead to their conclusion that Fisher supported the strike, appeared at union rallies, and collaborated with striking teachers. Petitioners demonstrated that Fisher's admissions supported this conclusion. Yvonne Larsen testified that she also relied on conversations with Barbara Brown and Jack De Barrow, reputable individuals in a position to know about Fisher's conduct during the strike. Based on this evidence, Petitioners argued that summary judgment should be granted in their favor because they did not act with actual malice.

In opposing the Petitioners' motion for summary judgment, Fisher acknowledged that she had the burden of establishing actual malice with clear and convincing evidence. She argued, however, that summary judgment was inappropriate on the issue of actual malice in public official defamation actions, citing *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n. 16 (1979), and that the usual summary judgment rules should be applied. Fisher argued that the motion should be denied on the ground that a finding of actual malice could be based on Petitioners' failure to further investigate.

The trial court granted the motion for summary judgment.

5. **Court of Appeal Proceedings.** On appeal from the entry of summary judgment, Fisher argued that summary judgment was not appropriate in public official defamation actions and that a question of fact was presented on the issue of actual malice based on Petitioners' failure to investigate Fisher's denial of media reports of her conduct.

Petitioners argued that the summary judgment should be affirmed because summary judgment is a favored remedy is public official defamation actions and Fisher failed to produce evidence sufficient to present a triable issue of fact as to actual malice under the convincing clarity standard. Petitioners argued that as a matter of law failure to further investigate media reports confirmed by reliable sources is constitutionally insufficient to establish actual malice.

The Court of Appeal reversed the summary judgment on the grounds that a question is presented on the issue of actual malice. Petitioners filed a petition for rehearing on the ground that the Court of Appeal decision imposed an excessive investigation standard, allowed one candidate to censor the other, and violated Petitioners' First Amendment rights:

> The investigation standard imposed by [the Court of Appeal] ruling would require repeated verification and investigation of information furnished by reputable informants with first-hand knowledge of the events. Such a rigorous standard cannot be constitutionally imposed. . . . Moreover, this investigation standard would require a political candidate to check with her opponent and refrain from making statements denied by her opponent, effectively giving one candidate the right to censor the other. . . . This requirement flies in the face of our democratic system of free speech and debate. (Citations omitted.)

6. **Petition to California Supreme Court.** Petitioners filed a petition seeking review of the Court of Appeal decision by the California Supreme Court. Petitioners argued that summary judgment is a favored remedy in public official defamation actions where actual malice must be established by clear and convincing evidence and that the Court of Appeal decision violated their First Amendment rights by imposing an unconstitutionally rigorous standard of investigation. Petitioners phrased the question presented as follows:

> In a public official defamation action, can a School Board Candidate be found to have acted with actual malice for failing to conduct an adequate investigation where the Candidate made campaign statements about

the incumbent based on information from a trustworthy source with first-hand knowledge of the events?

(a) Does a School Board Candidate have a duty to repeatedly reconfirm reliable information received from a trustworthy source?

(b) Does a School Board Candidate have a duty to investigate the Incumbent's denial of statements confirmed by a trustworthy source?

No. 82-2082

Office-Supreme Court, U.S.
FILED
OCT 12 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

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October Term, 1983

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YVONNE LARSEN, W. DANIEL LARSEN,
JOSEPH K. HARMON, and EDWIN J. GRAY

Petitioners,

vs.

JULIE FISHER,

Respondent

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL, STATE OF
CALIFORNIA, FOURTH APPELLATE DISTRICT

---

# RESPONDENTS' BRIEF IN RESPONSE

---

JULIE FISHER
3726 Charles Street
San Diego, California 92106
(619) 223-6623
In pro per

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The Court should grant this writ because generalized versions of the questions listed under REASONS FOR GRANTING THE WRIT I are presented by the decision below, and they are significant recurring constitutional issues concerning the application of New York Times v. Sullivan, that should be settled by this Court.

A. DO THE FIRST AND FOURTEENTH AMENDMENTS REQUIRE THAT DIFFERENT PRIVILEGES BE RECOGNIZED FOR MEDIA DEFENDANTS THAN ARE RECOGNIZED FOR NON-MEDIA DEFENDANTS IN PUBLIC PERSON DEFAMATION ACTIONS?

The question is not whether the New York Times actual malice standard applies to non-media defendants. The courts below were not asked to apply a standard more favorable to plaintiff than the actual malice rule. Fisher's position has been that both media and non-media defendants are protected by the actual malice rule and no more; and that the opinion and republication privileges are not constitutionally mandated for anyone. The discrepancy between media

and non-media defendants in this case involves the 'reporters' privilege' to repeat libels. The Appellate Court recognized a press privilege to republish libels. This issue is discussed in 82-2130

B. DOES THE NEW YORK TIMES ACTUAL MALICE STANDARD MODIFY TRADITIONAL SUMMARY JUDGMENT RULES AND PRESCRIBE A POLICY OF LIBERALLY GRANTING SUMMARY JUDGMENTS?

This issue was briefed by the parties and is addressed in the Appellate Court's decision. The trial court accepted defendants' argument that the First Amendment requires application of a different standard for summary judgments in public person defamation cases than in other civil actions. The Appellate Court rejected that position.

> "The summary judgments may be upheld only if the evidence, construed favorably to Fisher, raises no triable issues of fact. It is not sufficient the moving declarations, standing alone, would support a defense judgment. The trial court may not weigh the credibility of declarants nor pass on the merits of the issues presented, and must construe movants' declarations strictly."

C. DID THE APPELLATE COURT CORRECTLY APPLY THE ACTUAL MALICE STANDARD WHEN IT RULED,

> "Although mere negligence in investigating alone does not establish actual malice, evidence of the complete lack of investigation to determine the truth of the charges, of the Larsens' motive and intent in making the accusations, and their complete disregard of Fisher's denials may, by accumulation and by appropriate inferences, show recklessness."

The issue presented by petitioners as C. (p.13) is not supported by the record. It singly attacks one of the items of evidence that the Appellate Court said could be accumulated to show actual malice.

Petitioners' Statement of Facts does not give a full and accurate picture of the important facts. For example, it does not include the Goodman version of Fisher's 'bribery' attempt upon which the bribery charge made in the Oct. 24 speech was based.

**Goodman's version:**

"Julie Fisher walks into Tom Goodman's office, says: 'Look, Tom, we can't allow a strike to happen. We need the teachers' good will if we are to implement human relations training and a desegregation plan.' 'If you support my plan (tri-mester opt out desegregation plan) you'll gain such a good reputation you could name your job anywhere in the nation -- and we'd both be happy." (Appellant's Appendix, pages 530-531)

**Fisher's version:**

"I jokingly said, 'Tom let's work together. If the district solves these problems - integration and teacher relations - you'll look so good you'll get offers you can't refuse and we'll both be happy"

**Blackmail speech version:**

"She told the superintendent that if he agreed to collaborate with the teachers' union, she would see to it that he would gain such a good reputation that he could name his job anywhere in the country." But if he refused she would get him."

In addition to those issues cited by petitioners, the Court should review the opinion issue as it pertains to the Larsen defendants.

The Appellate Court stated in its decision,

> "The ninth cause of action alleged the Larsen campaign defendants defamed Fisher by criticizing her campaign advertising claim that windowless schools are costing taxpayers $100,000,000. extra."
>
> Viewed against the background of a heated political election, the trial court properly concluded Larsen's comments unambiguously expressed only her opinion and as a matter of law were entitled to First Amendment protection"

This issue is discussed in 82-2130.

## CONCLUSION

This Court has clearly stated both the reasons for recognition of a qualified constitutional privilege for honest misstatements of fact, and why an absolute privilege would defeat the purpose for which the qualified privilege is necessary.

> "If it be conceded that the First Amendment was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people, then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

> "The principles underlying the First Amendment remain paramount. Whenever compatible with the underlying interests at stake, under the regime of that Amendment we depend for correction not on the conscience of judges and juries but on the competition of other ideas. In a political campaign, a candidate's factual blunder is unlikely to escape the notice of and correction by the erring candidate's political opponent. The preferred First Amendment remedy of more speech, not enforced silence thus has special force. (Brown v. Hartlage, 456 U.S. 45, 53,61)

"The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the diliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple and administration.

(Garrison v. Louisianna, 379 U.S. 75)

Appendix A.1 contains the text of a TV debate illustrating the 'market-place' type of political exchange referred to in Hartlage. In contrast, Appendix A.2 contains the text of the October 24 'blackmail' speech. As the following testimony of W. Daniel Larsen indicates, this type of speech wins elections.

Q. "Now what issues were discussed on the night of the (October) 23rd as potential material for your wife's speech?

A. "All I remember, the general discussion was that we had to start hitting a little harder if we wanted to win the election."

Q. "Was that something the Mr. Gray said?"

A. "Yes."

Q. "To you knowledge had Mr. Gray had experience with writing speeches for other candidates?"

A. "Yes."

Q. "Did Mr. Gray make any suggestions as to how to go about hitting harder?"

A. "Just to call attention to the public what Julie Fisher had done that we didn't agree with." "He was a political professional, had been through it many times and knew that you couldn't beat an incumbent by laying low, that you had to come out in a forceful manner if you wanted to beat an incumbent."

Q. "Did you agree with him on this point?"

A. "Yes, I did."

Q. "Did your wife?"

A. "She was a reluctant candidate to start out with and it wasn't in her nature to come out and criticize anyone, so it was difficult for her to accept."

Q. "Did you accompany your wife to the University Club?"

A. "Yes."

Q. "When did she first receive a copy of the speech?"

A. "Just abgout a half hour before she arrived."

Q. "Did she read it before she gave the speech?"

A. "Yes."

Q. "Did you wife express concern over any of the language contained in the speech?"

A. "Not the language. She was just concerned about making the speech because she didn't -- as I testified before, she just didn't want to criticize Mrs. Fisher in this manner." "She was reluctant to make a hard-hitting speech."

Q. "Did you say anything to her to encourage her to give the speech as written?"

A. "Yes."

Q. "What did you say to her?"

A. "Told her that the time had come when we had to make some hard-hitting speeches if we wanted to win the election."

Q. "Did Mrs. Larsen continue to express hesitation concerning certain statements attacking Mr. Fisher?"

A. "No, she agreed that it had to be done."

Defendants in this case seek recognition of new absolute privileges for libel defendants and limitations on the use of investigatory

failure as evidence of reckless disregard of the truth. The net affect would be to increase the percentage of 'blackmail' type political communication and lessen the percentage of those of the 'market-place' type.

On the other hand, if the Court rejects the proposed absolute privileges and re-emphasizes that the actual malice standard is to protect only 'honest' misstatements of fact, political professionals will have to be more cautious when composing 'blackmail' type pieces. The net affect will be to encourage 'market-place' type political communication.

The Court should review this case.

Dated: October 9, 1983

Respectfully submitted,

Julie Fisher
Respondent

**KPBS BALLOT '77, FISHER - LARSEN, 11-4-77**

**Penner** (moderator) - "The state is mandating competency tests; the courts are requiring school desegregation; the teachers can now collectively bargain and have their demands legally heard, and the administration is very visible and strong and yet it is the school board that is actually accountable for what transpires within the San Diego Unified School District. How is it possible for a school board that only meets two afternoons a week to be a policy making body under all the influences that are apparently upon it?

**Fisher** - "Well I think this is one of the major problems and I recommended a change in the manner in which information comes to the Board that I think will assist the Board. Currently the school board really doesn't make the decisions; the school administration makes most of the decisions and gives the information that will lead the Board to rubber-stamp the school administration's decisions to the Board. I recommended that we - there are two votes now on the Board, John Witt and myself, for removing the job dependency of the people in the testing and evaluations services out from under the Superintendent so we would have an independent body. Right now people in our evaluations departments evaluate programs, but the the people that they are evaluating have determination over their jobs. I recommended that we establish an independent commission to make job recommendations directly to the Board for these two departments. It wouldn't cost any extra money at all. There would be no extra bureaucracy but what it would do would be to allow us to give major proposals to this department to analyze."

**Penner** - "This is a $250,000,000. operation."

**Fisher** - "$281,000,000. operation."

**Penner** - "What parallel is there in the business world for such a large financial operation to be run by a body who meets only twice a week?"

**Fisher** - "Well, I don't think there is one. I think, especially when you consider the filtering out of significant information, like - one of the controversial issues during the campaign has been over the building of windowless schools, and that was an example where the Board was given information on the cost of window breakage but wasn't given information on the extra cost of construction and maintenance; and we're spending over 100 million dollars extra, simply becuause of poor information. It's a real burden to the taxpayers."

**Penner** - "Yvonne, of course I will pose the same question to you. Do you really think it's feasible for the Board to be an effective board, meeting only two afternoons a week, and not be a rubber-stamp of a strong administration?"

**Larsen** - "I certainly think that they can; and I think it is time that the five elected Board of Education members do assume a position and a posture situation of being the Board of Education. They're the ones that hire and/or fire the Superintendent. They are responsible for establishing the policy and then asking the Superintendent and the administrative staff to implement what the Board of Education so decrees. I feel that if the five elected board members are responsive to one another and if they have an open mind, if they haven't made up their minds on all the decisions that they're projecting, they do have good dialogue and

all, they can take very strong leadership in seeing that their policy is implemented. I have chatted with some of the other board members and they certainly challenge the fact that my opponent says the information is filtered down; and I think if she feels that the information is filtered down that she should have done something about it up to this point in time."

**Penner** - "Like what?"

**Larsen** - "Certainly the charges that she has made have not been substantiated against the administration. The other board members say this is not true, so I wonder why she continues to articulate that. She says it is true and that it's filtered down; well, then, she has not done a good job and has not been an effective board member and an effective representative of the people. So she seems to be the one who is having the problem getting the information and I think for that reason she's ineffective."

**Penner** - "Just one more question, then we'll let Julie respond. Yvonne, some observers say that the administration really holds plums, if you will, for the board members; can determine which members can go on trips to distant and lovely places and that perhaps this is one method that the administration can use to keep the school board a rubber-stamping entity."

**Larsen** - "I haven't heard about any plums and I really don't think they are there."

**Penner** - "Julie do you want to respond?"

**Fisher** - "Well let's take an example of one of the charges, that windowless schools are costing 100 million extra dollars. I had this on a TV commercial. I'm a mathematician; I made the calculations very carefully,

and last week Yvonne accused me of lying, and she sent letters to the TV stations asking them to withdraw the TV commercial. I provided her and provided the TV stations with my calculations - with the substantiation - and it was enough for the TV stations. They've kept the commercial going. Now, I've asked Yvonne, if she doesn't agree with my figures - they're written very simply - any fifth grader should be able to understand them - if she doesn't agree with them then let's have an open debate and discuss them, otherwise, she should apologize. We should set an example for students. You don't make false accusations."

**Penner** - "OK Yvonne, and then we'll go on to Dennis for the next question."

**Larsen** - "The information that was given to me is from reports of the imcumbent. They are not from reports of any substance and or background material. They do not add up; they are without foundation and therefore I cannot find the answer to the querry that we have. She has said in her commercial and also in her statement, her piece of literature, 100 million dollars extra; now she's saying that she's projecting it over a 25 year period; but she doesn't say that on her television commercial; she doesn't say that on her printed literature. She talks about a construction program that is 103 milliion and then it becomes 143 million; last night it became 181 million dollars. Her figures are not consistent. She may be a mathematician, but she is playing games with mathematics and I think it is demeaning to the integrity of the voters that she is doing this."

**Fisher** - "Yvonne, if you disagree with the figures then don't you think we owe it to the public to discuss them openly? If you've got your figures and I've got mine, let's

discuss it in an open debate. You know costs of construction programs are not a matter of opinion; these are all on the record; we have mortgages and the 181 million figure I got from the records of our bonding company from our accounting office. You just list the projected cost of the building program, and it's there. There's no controversy about that."

**Penner** - "Julie, what we're going to do is move to another issue. We'll let Dennis go on with that. Dennis?"

**Dennis Cheney** - "One of the major policy decisions that the school board has made during the last year is on school desegregation. On a matter of desegregating San Diego Schools, you have expressed confidence in this plan. In light of the fact that many people have said that voluntary plans just have never worked in the United States?"

**Larsen** - "Because I think the various aspects that are available for implementation are so outstanding that they do give us an opportunity to accept them on a voluntary basis. I also feel that a lot of people have become very, very aware that the courts are looking over our shoulders and, if we do not come to a good voluntary program, what is farther down the road is going to be much more expensive and not in the best interest of the people. The Kaplan survey has indicated that the community wants to respond to a voluntary program and that they probably will respond to a voluntary program. The beginning of the statistics and all, of responsiveness to the voluntary program are an extremely good indication that the community will respond if we continue to properly tell people the options that are available and explain the various programs; the learning centers, the magnet schools, fundamental schools, and so on and so forth. I think

that the people will be very responsive and - San Diego has a marvelous pot pouri of people - that I think really are more geared to making a positive statement and I feel that it is going to work. As an elected Board member I will certainly encourage the voluntary way because I support the neighborhood schools. I'm opposed to mandatory busing and I think that the people will respond to the voluntary program."

**Dennis** - "Some people claim that integration doesn't improve the education for minorities. How do you respond to that charge?"

**Larsen** - "Well I'd like to see the best opportunity for education regardless of what site a student is attending and I think that we all need to learn to work together. I think we're putting a major burden on the Board of Education, where really the total aspect of integration is not just a Board of Education one; it is a community one. We do need to become acquainted with people of all kinds and have the experience of working together, really, to perpetuate what the United States of America is."

**Dennis** - "In your view, if integration is successful here in San Diego, do you think the schools should reflect the 65% - 35% racial split in the district?"

**Larsen** - "I think we'll have to see what happens and certainly those are goals. But, it remains to be seen how our population quotas and all are in time to come also."

**Dennis** - "Do you think each school ought to reflect the racial split of the population?"

**Larsen** - "I don't think it can in the initial stages; maybe down the road it can."

**Dennis** - "Julie you were one of the few

board members, the only board member to vote against the desegregation plan finally submitted to the court. Does this mean you don't think voluntary efforts will be successful?"

**Fisher** - "Well, no. First of all the recommendation made by the commission to the Board was not a voluntary plan. Probably the most important vote - and I attended almost all the commission sessions - the most important vote was when the commission had a choice between recommending one year of voluntary programs and then mandatory programs or three years of voluntary programs; and they rejected the recommendation for three years of voluntary programs by a vote of 62 to 2. So the recommendation of the commission was to try voluntary programs for one year and then move to mandatory programs and I reject that. I think that we should have a voluntrary program, a strictly voluntary program. The program that my opponent advocates would cost the taxpayers an additional 25 million dollars a year. I think it would just break the back of our taxpayers and I don't think we can spend that kind of money. I recommended an alternative that would cost not more than four million dollars a year, not any more than we are spending now; and it would be effective. I think you have to take other things into consideration. You can't just drain taxpayers and make them move out of their homes just for an integration program and I wouldn't favor any one that did."

**Dennis** - "On the windowless schools issue you brought up money and now you're bringing up money in this case."

**Fisher** - "I think that's one of the essential differences between my opponent and myself."

**Dennis** - "Wouldn't mandatory busing be cheaper

than any of the voluntary plans?"

**Fisher** - "I think mandatory busing would be tremendously expensive in terms of the community relationships and I don't think we have to have a mandatory program."

**Dennis** - "Yvonne, you wanted to respond?"

**Larsen** - "I'm, very fiscally accountable for funds that are used. But one question I would - or statement I would like to respond to as far as Mrs. Fisher's plan that she continues to promote. Her plan is in essence as opt out integration plan and it in no manner, shape or form would fulfill a court order."

**Fisher** - "Well, I attended the court sessions - all 30 days. I was the only Board member who attended the sessions. You know when you sit and you listen to the arguments and you listen to the judge, I think you get a very good idea of what would satisfy the judge and I would bet any amount of money that my program would satisfy the judge without any mandatory movement."

**Larsen** - "No person or group has ever come forth to endorse her plan, to say that it is functional or workable."

**Fisher** - "That's not true, because the district now has adopted the opt out part with the learning centers. Initially, the learning centers were going to be mandatory, and now they are on an opt out basis and I think that's a victory for my idea."

**Dennis** - "Yvonne, one last point and then we'll have to get to another question."

**Larsen** - "The learning centers were always projected as voluntary programs. They were not mandatory programs."

**Fisher** - "I'll get the tape that says differently."

**Penner** - "Yvonne, there's increasing truancy among upper middle class white students with the reason often given that boredom has set in. Do you feel that the quality of the teaching in the classroom is contributing to this?"

**Larsen** - "I would hate to think that it is, but I do feel that the challenge of 1977 and the more sophisticated world our students live in certainly, probably makes what used to be considered a very motivating type of atmosphere more than it might be today - I do feel that we should have a great deal more emphasis on career and vocational training and work experience programs and all that really can satisfy and challenge students - extra motivation. And I would certainly encourage as far as your reference to quality of teachers, that the universities and colleges continue to address themselves to a background of training for teachers - that they do have all the skills that are available to really give the students a good opportunity to learn and to keep up with the years and with current things and to be good teachers."

**Penner** - "What about the teachers who are already in the system - the tenure system which permits teachers after seving a probationary period to stay in their positions permanently no matter what happens; no matter what. If they commit some crime certainly they will be removed; but if their teaching does deteriorate what recourse is there if there is tenure?"

**Larsen** - "I think that we really must start to consider that tenure is an antiquated and out of date piece of legislation. It

was something that served at a particular time in our history and I hear so often from students now when I'm out at the various sites and all, 'What can you do about tenure?' Well we as the Board of Education really cannot do much of anything other than bring to the people that it is a problem. It is a State of California problem to change anything in the tenure area; but we do need to - now that the teachers have the opportunity to have collective bargaining - address ourselves to the fact that tenure is not in the best interests of the students and perhaps it has outlived its life span and should be eliminated."

**Penner** - "Julie do you think collective bargaining is the answer or one of the answers?"

**Fisher** - "I wonder if I could just comment on the truancy issue?"

**Penner** - "I was going to get to that"

**Fisher** - "Because I.."

**Penner** - "Go ahead."

**Fisher** - "Truancy has been one of the problems that I've worked the hardest on. I found that that was a major concern of people in the schools and it was something that was brushed, swept under the rug by the central administration. I conducted several studies by just going to the computer printouts and analyzing the relationships between truancy and academic performance and between truancy and violence; and I understand my opponent is having a news conference today to accuse me of violating the right of privacy laws or something - but absentee records are not private. Every school has absentee lists that they circulate throughout the school every day, so I haven't revealed anything. I think that the particular point,

why this came out was because while I was researching absentee records I found that there were a number of students who were not enrolled in the minimum number of classes and for several schools we were collecting more funds than we were eligible for."

**Penner** - "What do you think is responsible for this?"

**Fisher** - "Well, I think it is a problem that hasn't been faced up to. I think it's been a big help to have a board member bring it out and have the newspapers cover it because that's given strength to the people in the schools. Now we have more schools that are setting limits for absenteeism. I don't think students should have the choice of whether they go to school. I think it's nice to make classes - and we should try to make classes attractive.."

**Penner** - "Why do you feel the students are not going to school?"

**Fisher** - "Well I think that we're giving them the choice by not enforcing the rules."

**Penner** - "You mean that if they have the choice of going or not going their preference would be to not go?"

**Fisher** - "I think students are just like people going to work. How many people would go to work if they had the choice of going or not going? I mean going to school is a students work and they have to go whether they like it or not. I think we ought to start from there, then we should make the classes attractive and try to interest the students. If they have that decision when they're young that means it cuts out a lot of decisions when they're older."

**Penner** - "Well let's look at the teachers.

To what degree do you feel that teachers are responsible for not motivating or inspiring students to stay in school?"

**Fisher** - "Well, I think that most teachers - there's a big range in which any individual can perform. Almost all of our teachers can be excellent teachers or mediocre teachers depending on whether they put out that extra effort. I think the Board's responsibility is to try to make the classroom climate such that it will encourage the teachers to put out that extra effort. Like, - class size is a very important thing. If you have 40 students, you know, five classes of 40 students, you get so harrassed that you get discouraged and you don't put out that extra effort."

**Penner** - "What do you think is the optimum number of students in a class?"

**Fisher** - "Well, I think it depends on the class. I certainly wouldn't have 200 contacts for a secondary teacher."

**Dennis** - "Julie again, last June during the strike you sided with many of the teachers' claims and even granted them amnesty. In this election year you've been endorsed by the teachers' association and organized labor. How do you respond to the charge that you have lost sight of your public responsibility and have given in to the teachers far too often?"

**Fisher** - "First of all, I don't favor strikes and I didn't agree with the strike. I think that many of the claims of the teachers and many of the things they were asking for should be given, like a reduction in class size. I think the Board - probably the problem is that the Board of Education has adopted the attitude of the top administration and that is that collective bargaining

means an all out war between the management team and the teachers; and I just don't go along with that. I think that if we work together then we can come up with a better educational system. There are many areas where I differ with the teachers' organization. The area of testing is one area. I think that we should have more testing and we should have tests at the end of each year and we should have definitive measurements of where a child is."

**Dennis** - "You brought up collective bargaining and Yvonne brought up collective bargaining in relationship to tenure. Do you think now that teachers can join as co-equal negotiators in their own contracts that they should give up the protection of tenure?"

**Fisher** - "Well, I think that the reason for tenure is to free teachers from political influence. In communist countries if you have a change of government, the first thing they do is to fire all the teachers and then they put in teachers who will indoctrinate the students. That is the basic reason for tenure. Tenure should not be used to cover up mediocrity. During the past year there have been a few instances of teachers who have been tenured teachers who have not been able to control their classes and they've been let go. There is a procedure for releasing tenured teachers. But I think as part of collective bargaining the Board of Education should require that teachers take on greater responsibility for maintaining the quality of teaching - like - math teachers should set standards for math teachers and enforce them; you should have a peer pressure."

**Dennis** - "Yvonne, you've been critical of the Board's granting amnesty to the striking teachers, claiming it was letting law breakers go free; but what would you have done in those crucial days in June when the teachers

were out on strike?"

**Larsen** - "May I speak briefly to what preceded this. I find great fault with the fact that the San Diego Teachers' Association became the bargaining agent for the teachers in March '77; that contract negotiations between the SDTA and the District or their representative started May 11; the strike was called June 6. This is a three week period of time. Most people who have worked with contract negotiations know that three weeks of conversation really does not cover full base in providing a good meaningful contract. The Rhodda Act was put into law a year or two ago to give protection to public education and to give them the opportunity to resolve their differences. Now in this particular instance in San Diego, just having had the SDTA become the bargaining agent - have this brief period of time to really give the first try to the Rhodda Act - to have the San Diego Teachers' Association call a strike at the time that they did without using the Rhodda Act with its clause for mediation and fact finding, I think was incredible. Strikes by public employees are illegal; I also think they are immoral. I think the fact that this was the end of the school year was definitely a political ploy. Many students were put into an extremely emotional situation by this. Students were ready to graduate; they didn't know whether their grades would be on their transcripts or they would be eligible to go to college and certainly the end of the year capsulizes a lot of hard work for many students and it's a most emotional time and the strike, the timing of it was just an incredible situation and certainly a blot on San Diego. And I feel very strongly that the Board of Education members and the San Diego Teachers Association, District representatives etc. need to have more good dialogue and meaningful communication and I feel as an elected Board

member that I have not made up my mind on everything, that I have the skills to listen and to work together and to give leadership to see that this blot would never happen again."

**Dennis** - "Now that you've led us up to the period of the strike, what would you have done once they went out on strike?"

**Larsen** - "I would not have granted them amnesty and I know that you cannot go out and certainly put all of the teachers in jail because there was a sizeable number of them, but I certainly would not have complimented them."

**Dennis** - "Would you have fired themn?"

**Larsen** - "The ramifications legally of firing that number of teachers would be insurmountable."

**Dennis** - "But you have supported the statewide initiative that would fire striking public employees?"

**Larsen** - "I have not. I have not signed it. After the election is over I certainly am going to give some thought to what I'm going to do in that area; but they would not have received a pat on the back and say, 'Good show, you defied law and order, what an example you're doing." I probably would have put a certificate or a statement in their folders noting that they had gone out on strike or an additional dock in pay or a fine for it."

**Dennis** - "In general do you think the Rhodda Act that brought collective bargaining to education has benefited education?"

**Larsen** - "From the first breath, certainly not. But I think that the idea of it, if it is utilized in the future, certainly

can solve lots of differences."

**Penner** - "A couple of quick questions in the last two minutes of the program, and the responses will have to be brief as well. Grades A B C D and F are often given to students to identify the quality of their work. Julie, I'm giving you a chance to grade the San Diego City Schools. In terms of quality of education, what grade would you choose?"

**Fisher** - "Well, I think for a child who is motivated and goes to school they would be a top A. My son and his..."

**Penner** - "I'm talking about the system itself."

**Fisher** - "I think it depends - we're meeting the needs of motivated students who go to school and who study. For the children who are less motivated I think we can do a much better job. I think we have to work on factors like truancy."

**Penner** - "You would give two grades?"

**Fisher** - "Well I think that it's warranted."

**Penner** - "Yvonne, same question."

**Larsen** - "I'd love to say it's an A but I think it's probably somewhere in the B range."

**Penner** - "One other very fast question. As you know Senator Briggs has introduced an initiative to bar homosexual teachers from the school system. Do you support that initiative?"

h**Larsen** - "I haven't taken action on it."

**Penner** - "Do you have any feelings about it?"

**Larsen** - "I think if the homosexual teacher would be proselytizing in the classroom they should not be in the classroom."

**Fisher** - "We agree on something."

**Penner** - "Julie?"

**Fisher** - "I think I'd take the same position."

**Penner** - "Would you then, if the initiative did get on the Nov. ballot, would you vote for it?"

**Fisher** - "I haven't taken - I don't think I would."

**TEXT OF SPEECH READ BY YVONNE LARSEN**
**OCTOBER 24, 1977**

Ladies and Gentlemen:

Several months ago, after devoting many years to my family and serving in various capacities as a community volunteer, I made the decision to run for the San Diego School Board.

As you will recall, we had just gone through a wrenching and unlawful strike goaded on by many of the school teachers in the district by the teachers' union leadership.

And we all read with horror the accounts of my opponent's irresponsibility as a member of the school board. We watched her as she leveled a series of scurrilous charges against the superintendent of schools. This sorry chapter in the history of our schools was nothing less than blackmail.

She told the superintendent that if he agreed to collaborate with the teachers union, she would see to it that he would gain such a good reputation that he could name his job anywhere in the country.

But, if her refused, she would get him. She would accuse him of many things and publicly call for his resignation.

The superintendent refused to go along

with what was almost a form of bribery.

Frankly, I hold no brief, either for or against the superintendent. He was fully able to defend himself against the false and vicious charges he was threatened with.

But outright blackmail is not a quality I take too lightly.

It was this shameful action by my opponent which presaged the illegal strike hatched by the teachers' union leadership in the waning weeks of the spring semester.

The judge whose responsibility it was to decide on the matter called the strike -- and these are his words -- "a shameful blot on the history of the teaching profession in San Diego."

Judge Lazar said "the strike was instituted to use its disruptive effect for the school process and the children.

"The only persons directly affected by the strike were the children who, in blunt language, were exploited as hostages, for the purpose of a political power play." the judge said.

The strike -- by any standard -- was illegal. In my opinion, it also was immoral. And my opponent was associated with it every step of the way.

Unfortunately for everyone -- and especially for our children, the students -- it came

at the worst possible time. For many parents, it was a disquieting event, to say the least. For the teaching profession...especially the public's perception of the profession...it was a net minus, a step backward.

And, the thousands of teachers who refused to leave their classromms to violate a court order...the teachers who stayed with their students despite the intense pressures of the teachers' union leadership to break the law...wrongfully suffered from the understandable backlash of the community.

As if the strike were not enough, my opponent then voted to reward open disobedience of the court order to end the strike. She voted to reward the striking teachers with amnesty.

Her vote, coming as it did from one who earlier sought to blackmail the school superintendent, should not have been surprising.

But, still I was shocked.

How could a member of the San Diego School Board -- a person who is sworn to obey the law and set a good example for our children -- so condone the illegal activities spurred on by the teachers' union that she would actually vote to reward these unlawful activities with amnesty?

I remembered the words of the judge: "The children were exploited as hostages...for

the purposes of a political power play."

Certainly, that sort of cynical behaviour spurred on by the teachers' union leadership is not deserving of amnesty.

It was on the basis of my opponent's shoddy, unprofessional, divisive and irresponsible performance..and failure to meet the obligations of the public trust vested in her as a member of the San Diego School Board that I made my decision at the last moment...to enter the race.

I believed the people wanted a change. Everything I have learned since then about my opponent's shocking failure to perform her duties has justified that belief.

In my opinion, this is one of the most important races in this elecion. What happens on November 8 will determine for years in the the future the kind of school system our children will experience.

Even more important...it will determine in significant measure...the kind of future our students can look forward to.

Are our schools to be run by the teachers' union leadership? Or will they be run by the citizenry...the taxpayers...the parents and grandparents of our children?

We already have had many hints as to how the people feel. In the September 20th primary election, more than 60 percent of

the votes cast in District C, were against my opponent. I, myself, received just a few hundred votes less than Julie Fisher.

This was an unexpected and certainly amazing number, given the fact that my campaign only got off the ground a matter of weeks earlier. In fact I and my fellow candidates who opposed the incumbent in the District C race literally had to come from nowhere.

Still, my opponent failed to carry her own district -- a sad commentary on the way people of her own district perceive her performance.

You'll be interested to know that the two other candidates in District C who ran against her strongly support my candidacy. They are Jack DeBarrows and Barbara Brown.

The agree with me that the real issue in this campaign is my opponent.

She serves as an ever present tool to be used at will by the teachers' union leadership. She has used the board of education as her playtoy for nearly four years.

Listen to the San Diego Union. The newspaper last month said she "has been a solitary and disruptive force on the board during her one term."

The Union pointed out that Julie Fisher was the sole vote on the board of education against a plan for voluntary integration

drawn up by the Citizens' Advisory Committee for Racial Integration. This voluntary plan, which she voted against, was one which was laboriously developed by her colleagues, by the school administration and by a citizens' advisory commission.

During the process of drawing up that voluntary approach to integration, she violated her public trust by passing on confidential, privileged information to the plaintiffs in the Carlin Case. Superior Judge Welsh characterized her irresponsible actions as those of a "turncoat" and a "renegade."

To this day, we do not know what her position is on integration other than the fact that she voted against the voluntary plan I outlined earlier. And this is not surprising, because my opponent is a master of obfuscation, of confusion.

Let's try to cut through just a bit of that obfuscation for a moment.

She has suggested that her idea -- certainly not a plan -- would be to somehow institute a program of year-round schools. Precisely how this might bring about voluntary integration is a riddle at best.

Perhaps the best indicator of her sentiments was stated by her a few days ago. She said her plan would make Lincoln High School (now about 95 percent black) 60 percent

white and 40 percent black. This is what she said, regarding Lincoln High School.

I want you -- the members of this audience -- to ask my opponent during the question and answer session after the debate how she would bring about her desegregation plan. Unlike you I have seen and heard my opponent in many forums recently.

She is the master politician. She deliberately leaves most questions unanswered. She also combines evasion with sheer demagoguery. That is to say, no one knows what it really was that she said, but because it's simplistic it somehow sounds good.

Further, she has a different message for every group...depending on the group and what she thinks it wants to hear.

Now, these tricks have been used by crass politicians for a long time.

The fact is my opponent continues to shy away from the educational issues in this race. She doesn't want to talk about them. It may well be that she is shaky and unsure on the issues. I suspect it's really because her stands on the educational issues are unpopular enough that she simply doesn't want to speak freely about them.

Like, for example, amnesty for those teachers who walked out of classes...and left many thousands of kids to flounder.

Speaking of the teachers' union strike, I want to make it clear that two thousand of the city's teachers had the courage not to succumb to the pressure of the strikers.

Yet, my opponent, slapped in the face those teachers who stayed on the job and obeyed the law by rewarding those who broke the law and defied our courts.

I urge you in this audience to ask my opponent how she can be in favor of rewarding lawbreakers. Please ask how, as a member of the school board, she was able to give aid and comfort to the same teachers' union which chose to break the law and contemptuously ignore the order of a court of law.

Ask her how she can justify being a tool of a special interest group, the San Diego Teachers Association -- and expect to serve the interests of the community at large, including taxpayers and parents.

Ask her why she brings continual disruption to our school board.

Ask her why she votes against the majority of the school board on so many issues.

There are other questions. Many questions. Ask her about them. Examine the way in which she responds..if she responds at all.

As I told you before, I have never run for political office. Oh, I was elected student body president at Hoover High, and

I've had a number of leadership responsibilities in the community. I've been a member of the board of trustees of the State Universities and Colleges and I serve on the Advisory Board to San Diego State University. But, I've never run for political office.

I'm not a politician...the kind of person who wants to make it a career. Perhaps this race would be easier for me if I were. I am a woman--wife, mother, citizen -- who thinks something can be done to improve the quality of education for our children.

After all, our children are the only real future we have.

I know politics can be dirty. Campaigning is hard.

Campaigns are not always won on the issues. That is a political fact of life, albeit a sad one.

I want this campaign to be won on the issues. The Board of Education is simply too important to the life of our community and the educational needs of our children to be represented by cynical political reality.

Early in this campaign, I determined that I would not let personalities intrude. I would carry my beliefs forward, try and make them heard -- and understood -- so the voters could decide who would best represent the interests of our children.

As I've already indicated, my opponent has chosen not to do that. She is the master of the non-issue. The irrelevency. The red-herring. She is glib and slick at it. That's because she is truly a politician.

Unerstandably, she wants money for her campaign. she protests that she can't raise it. If we are to believe her, few want to contribute. If that's true -- because she indicates she's having a problem --then you can draw you own conclusions as to why.

But, like a true politician, my opponent continues to try to turn an embarrassing and telling negative around, and make political hay with it.

She wants the issue to be that Yvonne Larsen has financial support.

Yes. People from every corner of the community have seen fit to donate to my cause...because they are hoping for new reason to be injected into the Board of Education. They're appalled by my opponents' performance -- the disruption, the irresponsibility, the sham she represents.

They want what all of us as parents, taxpayers and citizens deserve. They want a better chance for our kids. A chance for the future in a society where the three "rs" are too often joined by a 4th today -- "Remedial"

They are fed up with the notion that laws are applicable only to those without political clout. That laws can be broken by those who have political friends on the school board.

I say it's time we get on with what this campaign is really all about. Not cheap politics, not obfuscation of the real issues, not the demagoguery of the politician, but educational issues that relate specifically to what we want for our children.

Again, I urge all of you in this audience to listen carefully to what my opponent has to say and to measure her on the way she addresses the real issues...the educational issues...of this campaign.